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Supreme Court of the United States

OCTOBER TERM, 1938.

No. 528.

UTAH FUEL COMPANY, INDEPENDENT COAL & COKE COMPANY, LIBERTY FUEL COMPANY, ET AL., - - - - - - Petitioners,

versus

NATIONAL BITUMINOUS COAL COMMISSION, AND PERCY TETLOW, PLEAS E. GREENLEE, ET AL., - - - - - - Respondents.

BRIEF FOR PETITIONERS.

ROBERT E. QUIRK,
J. V. NORMAN,
Attorneys for Petitioners.

December 27, 1938.

WESTERFIELD-BOHTE CO., INCORPORATED, LOUISVILLE, KY.

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Supreme Court of the United States

OCTOBER TERM, 1938

No. 528.

UTAH FUEL COMPANY, INDEPENDENT COAL & COKE COMPANY, LIBERTY FUEL COMPANY, ET AL., - - - - - - - - *Petitioners,*

v.

NATIONAL BITUMINOUS COAL COMMISSION, AND PERCY TETLOW, PLEAS E. GREENLEE, ET AL., - - - - - - - *Respondents.*

BRIEF FOR PETITIONERS.

OPINION OF COURT BELOW.

The opinion of the United States Court of Appeals for the District of Columbia was rendered on December 5, 1938, and is not yet reported. It is found at pages 22 to 32 of the record. The District Court of the United States for the District of Columbia rendered no opinion, but its decree denying motion for temporary injunction and dismissing the bill of complaint is found at pages 18 and 19 of the record herein.

STATEMENT OF JURISDICTION.

This case is here on writ of certiorari to the United States Court of Appeals for the District of Columbia, granted by this Court on December 17, 1938.

THE STATUTE.

The pertinent provisions of the Bituminous Coal Act of 1937 are set forth in the discussion that follows and are also found in the Appendix hereto.

STATEMENT OF THE CASE.

This case comes to this Court on writ of certiorari to the United States Court of Appeals for the District of Columbia, to review a judgment of that Court affirming a judgment of the District Court of the United States for the District of Columbia, denying a motion for injunction and dismissing the bill of complaint. Inasmuch as defendants moved to dismiss the bill of complaint, there is no dispute as to the facts, and except as otherwise noted, the statement of the case is derived from petitioners' bill of complaint (R. 3-15). The controversy herein involves the construction of various provisions of the Bituminous Coal Act of 1937, set out below, but, as will appear from the opinion of the Court below, that court held it had no jurisdiction to decide such controversy.

The Bituminous Coal Act of 1937 created the Commission whose duty it is, among other things, to prescribe by order, after notice and hearing, minimum prices to be charged by producers of coal who are members of the Bituminous Coal Code for coal sold by them which is subject to the Code. Petitioners, are, and at all times mentioned in the bill of complaint have been, members in good standing of the Bituminous Coal Code, promulgated by the respondent Commission. The provisions of the Bituminous Coal Code are prescribed in the Act. These minimum prices are related to cost of production, and in order that the Commission may know what these costs of production are, the Act provides for the submission to the Statistical Bureaus of the Commission by Code members of data disclosing their costs and sales realization. Section 4, Part II, of the Act provides in part as follows:

> "The Commission shall have power to prescribe for code members minimum and maximum prices, and marketing rules and regulations, as follows:
>
> "(a) All code members shall report all spot orders to such statistical bureau hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the preparation, cost, sale and distribution of coal as the Commission may authorize or require. All such records shall be held by the statistical bureau as the confiden-

tial records of the code member filing such information."

Section 10(a) of the Act provides as follows:

"Sec. 10 (a). The Commission may require reports from producers and may use such other sources of information available as it deems advisable, and may require producers to maintain a uniform system of accounting of costs, wages, operations, sales, profits, losses, and such other matters, as may be required in the administration of this Act. No information obtained from a producer disclosing costs of production or sales realization shall be made public without the consent of the producers from whom the same shall have been obtained, except where such disclosure is made in evidence in any hearing before the Commission or any court and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission."

On July 15, 1937, the Commission entered its Order No. 15. In that order the Commission recited that to perform effectively its duties under the National Bituminous Coal Act of 1937, it was required to be fully informed as to the production and distribution of bituminous coal, and that pursuant to the authority conferred on it by Section 10 (a) of the Act, each producer of bituminous coal, including petitioners, was directed to file with the Commission a complete report showing the detailed cost of tonnage produced and

realization prices derived from the sale of coal; that such reports were to be made separately for each mine and to include all coal produced during the calendar year 1936, and all coal sold during the same period. A copy of this order was sent by the Secretary of the Commission to each known coal producer within the United States, together with cost forms, which the Commission had provided for the making of such reports. Each producer was required by the order to file, and the petitioners did file, duly verified reports with the Statistical Bureau of the Commission for the district within which the reporting mine or mines were located. The order referred to contained the following provision:

> "The Commission directs special attention to the provisions of section 10 of said Act relating to the confidential nature of the report required under this order, and further gives notice that the penalties provided for non-compliance with this order by the producer will be strictly enforced."

The cost forms prepared by the Commission accompanying the Commission's order, which were used by petitioners in submitting their detailed production costs and sales realization, bore at the top in bold type, the following statement:

> "THIS REPORT IS REQUIRED UNDER THE PROVISIONS OF THE BITUMINOUS COAL ACT OF 1937 AND IS THEREFORE CONFIDENTIAL.

Petitioners as members in good standing of the Bituminous Coal Code, and pursuant to the requirements of said order and the provision of Section 4, and relying on the confidence imposed by such provision, as well as the statement above quoted, prepared and filed with the Statistical Bureau of the Commission, for their respective districts, complete cost and realization reports for 1936 for each of their mines.

After these reports had been thus filed by petitioners, the Commission, on March 30, 1938, made and promulgated a ruling in which it announced that it would thereafter give public notice of a hearing to be held to determine the weighted average of total costs of the tonnage of coal for each minimum price area (as defined in the Act), in the calendar year 1936, adjusted as provided in Section 4, Part II, of the Act. In its ruling the Commission further announced that at such hearing the information obtained from individual coal producers with respect to individual costs of production of coal of such producers in the calendar year 1936 would be made available by the Commission for inspection and introduction in evidence for certain specified purposes, and that it construed Section 10 (a) of the Act as authorizing such a disclosure in such manner and under such circumstances.

Thereafter certain of the petitioners herein filed a petition with the Commission, which objected to the Commission's ruling of March 30, 1938, as erroneous, and which prayed, *inter alia*, for a hearing, and that upon consideration of the facts and circumstances recited in the petition and the provisions of

the Bituminous Coal Act of 1937, the Commission vacate the ruling and rescind its construction of Section 10 (a) of the Act. The Commission thereupon assigned that petition for hearing and the petitioner, Mallory Coal Company, and certain other coal producers, participated in that hearing. As a result thereof, on June 1, 1938, the Commission filed its report, findings of fact, and opinion, and made and entered an order as of that date. In that order the Commission adhered to its ruling of March 30, 1938, reciting the substance of the petitions and the evidence of injury, and thereupon denied said petitions and ordered and directed:

> "That the Secretary of the Commission be and he is hereby directed to cause the individual cost returns of the producers, as above described, to be made available for inspection by interested parties in the final hearing in the establishment of minimum prices and marketing rules and regulations, so that the same will be available for introduction in evidence if and when required."

The petitioner, Mallory Coal Company, and certain other coal producers, believing that the Bituminous Coal Act of 1937 properly construed prohibited the Commission from disclosing the cost and sales realization data filed by them with the Commission in the manner threatened, and being thus aggrieved by the order of the Commission of June 1, 1938, filed a petition for review by the United States Court of Appeals for the District of Columbia, pursuant to the provisions of Section 6 (b) of the Act. That petition was

heard and considered by that Court, and on August 1, 1938, in No. 7178, *Mallory Coal Co., et al.*, v. *National Bituminous Coal Commission,* 99 Fed. (2d) 399, the Court dismissed the petition on the ground, *inter alia,* that the order entered by the Commission was not a reviewable order under the provisions of Section 6 (b).

On August 31, 1938, the Commission made and entered orders directing the Secretary of the Commission to cause the verified cost reports of all the individual producers in the various districts, including petitioners, "to be made available for inspection during business hours," on and after certain dates named in the order, by those interested parties who had filed appearances in the proceeding before the Commission.

Still believing that the Act properly construed prohibited the Commission from disclosing their cost and sales realization data in the manner threatened, having no remedy at law or by way of review, and being threatened with action which would subject them to irreparable injury, the petitioner, Mallory Coal Co., as well as these other petitioners, September 7, 1938, instituted this action in the District Court of the United States for the District of Columbia, to enjoin the Commission from making the threatened disclosure, and praying for a declaratory judgment. The District Court filed no opinion, but in its order dismissing the bill of complaint and denying the motion for a temporary injunction (R. 18), stated that the acts sought to be enjoined were authorized by and not in violation

of the Bituminous Coal Act of 1937. On application of petitioners to the United States Court of Appeals for the District of Columbia, an injunction pending appeal was granted (R. 33), whereby the defendants were enjoined "from making available for inspection by interested parties, or others, the individual verified cost reports of the petitioners, as described in the bill of complaint and in the orders of the National Bituminous Coal Commission, promulgated August 31, 1938, in Docket 15 of said Commission." Thereafter on December 5, 1938, in No. 7247, *Utah Fuel Co., et al.*, v. *National Bituminous Coal Commission, et al.*, the United States Court of Appeals for the District of Columbia affirmed the judgment of the lower court dismissing the bill and denying the motion for injunction, on the ground, as appears from the opinion of that Court filed herewith as a part of the record, that the District Court did not have jurisdiction either under its general equity jurisdiction or under the Declaratory Judgments Act, to determine the legality of the Commission's threatened action (R. 22-32).

On December 8th petitioners filed with the United States Court of Appeals for the District of Columbia their petition for rehearing, wherein, among other things, they called the Court's attention to the apparent conflict between its decision and the decision of this Court in the case of *Shields, et al.*, v. *Utah Idaho Central R. Co.*, as hereinafter set forth. At the same time petitioners filed with said Court a motion for stay pending disposition of the petition for rehearing

and, in the event it be denied, pending action by this Court.

On December 10, 1938, the Court of Appeals for the District of Columbia entered its order denying petition for rehearing, staying its mandate until the 10th of January, 1939, and continuing the injunction theretofore granted by it, pending application for writ of certiorari and stay order to this Court within 10 days (R. 33).

Thereafter, on December 16, 1938, the petitioners filed their petition for writ of certiorari with this Court, together with motion for an injunction, and on December 17, 1938, this Court entered its order granting the petition for writ of certiorari, assigning the case for argument on Tuesday, January 3, 1939, and granting an injunction to maintain the *status quo* pending final disposition of the case by this Court.

STATEMENT OF FACTS.

There is no dispute as to the facts since they are stated in the bill of complaint (R. 3) and are admitted by the motion to dismiss (R. 16). These facts have been sufficiently stated in the "Statement of the Case" and will not here be repeated.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

In the brief of petitioners in support of the application for writ of certiorari there is set out, as required by the rules, a specification of errors intended

to be urged if a review be granted. The specification is as follows:

Petitioners would, upon review, contend that the United States Court of Appeals for the District of Columbia erred:

1. In holding that the District Court was without jurisdiction to enjoin the respondents from taking the action which they are threatening to take, and in failing to hold, on petition for rehearing, that its opinion was in conflict with the opinion of this Court, rendered the same day, in *Shields, et al.*, v. *Utah-Idaho Central R. Co.*

2. In failing to hold that the action which respondents are threatening to take is specifically prohibited by the provisions of the Bituminous Coal Act of 1937.

SUMMARY OF ARGUMENT.

1. The District Court has jurisdiction to grant the relief sought and the complaint states facts sufficient to constitute a cause of action. All the requisites of equitable jurisdiction are present. The plaintiffs are being: (1) threatened by officers of the United States with immediate unlawful action; (2) which would inflict irreparable injury; and (3) have no adequate remedy at law. All of these matters are alleged in the bill of complaint and the same states a cause of action. On the pleadings, the allegations of fact contained in the bill must be taken as true.

2. The exception in Section 10 (a) of the Bituminous Coal Act of 1937 cannot be construed to give to the Commission authority to make public at a hearing to establish minimum prices, the individual cost reports of Code members made by them pursuant to the terms of the statute and the Code in the manner proposed, without nullifying the provisions of the Act which provide that such information shall be held as the confidential records of the Code member filing same, and specifically without nullifying the unqualified rule in Section 4 II (a), and the rule in Section 10 (a) to which the exception is made. Taken by its four corners, the Act cannot be construed to permit the publication of these reports under the circumstances and in the manner here proposed without destroying the general policy and purpose which runs throughout the Act, and without imputing to Congress either an intent to mislead and deceive or ignorance of the meaning of the language used in the exception.

3. Respondents contend that the Court should resolve all doubts of construction in favor of avoiding any question as to the constitutionality of the proceedings by the Commission under the Act. In answer to this contention petitioners say that the meaning of the Act is clear, and that the Court may not ignore the plain terms and meaning of the Act in order to avoid a possible question of constitutionality, and that to construe the Act as requested by the defendants would be for the Court to indulge in "disingenuous evasion."

4. While the question whether the interested parties would be denied a fair hearing necessary under

the requirement of due process if the individual cost data be not disclosed, is not here and not necessary for the decision of this case, petitioners contend that if considered it must be answered in the negative.

5. If the underlying data on which are based statistics used in carrying out the provisions of an Act of Congress must be disclosed and made subject to verification, not only would the Act here in question be unworkable, but the same would be true as to numerous other Acts of Congress, if, indeed, such other Acts would not be unconstitutional on their face. Among the other Acts to which reference is made as coming within this rule are the Agricultural Adjustment Act of 1938 and the Fair Labor Standards Act of 1938.

ARGUMENT.

The District Court Had Jurisdiction of This Cause and to Grant the Relief Sought.

The Court of Appeals for the District of Columbia held that the District Court was without jurisdiction and affirmed the judgment of that Court dismissing the bill of complaint.

That this ruling was in error we think is established by numerous decisions of this Court and particularly the decision in *Shields, et al.*, v. *Utah-Idaho Central R. Co.*, decided December 5th, and not yet reported. The opinion of the Court of Appeals herein, taken in conjunction with its opinion in *Mallory Coal Co.* v. *National Bituminous Coal Commission*, 99 Fed.

(2d) 399, holds that as to every matter arising from an action of an administrative agency, review must be had in the Court of Appeals, or in no court at all, and further holds that the petitioners have no remedy because the determination of the Commission was not a final order.

This Court had already held, in *Shannahan* v. *U. S.*, 303 U. S. 596, 82 L. Ed. 740, 58 Sup. Ct. Rep. 732, that the determination of the Interstate Commerce Commission, there involved, was not subject to judicial review under the provisions of the Urgent Deficiencies Act. In the *Shields case* this Court held that such a determination was subject to judicial scrutiny by a single judge District Court under the Court's general equity jurisdiction, inasmuch as the Commission's determination finally determined the rights of the complaining carrier. We here quote from the opinion of this Court in that case:

> "We have held that the determination of the Commission is not an 'order' reviewable under the Urgent Deficiencies Act of October 22, 1913. *Shannahan* v. *United States, supra.* But we have not held that the determination of the Commission was not subject to judicial review by other procedure, a question which, as we said in the *Shannahan case,* we had no occasion there to consider. *Id.* at p. 603. The nature of the determination points to the propriety of judicial review. For, while the determination is made by the Interstate Commerce Commission for the purposes of the Railway Labor Act and not for further proceedings by the Commission itself, it is none the less

a part of a regulatory scheme. It has the effect, if validly made, of subjecting the respondent to the requirements of the Railway Labor Act which was enacted to regulate the activities of transportation companies engaged in interstate commerce. * * * Equity jurisdiction may be invoked when it is essential to the protection of the rights asserted. * * *" (Italics ours.)

Here, as there, the action sought to be enjoined is not an "order" reviewable under the statutes specifically applicable to the administrative agency whose action was sought to be enjoined. Here, as there, the equity jurisdiction invoked is essential to the protection of the rights asserted because unless that jurisdiction is exercised to protect such rights they will be absolutely destroyed. It is therefore submitted that the basis for jurisdiction in the *Shields case* cannot be distinguished from the basis for jurisdiction in the instant case.

Section 24 (8), as amended, of the Judicial Code (U. S. C., Title 18, Sec. 41 (8)) provides as follows:

"Sec. 24. The district courts shall have original jurisdiction as follows:

* * * * * * *

"(8) Eighth, of all suits and proceedings arising under any law regulating commerce."

Section 41, as amended, of title 18 of the Code of the District of Columbia provides as follows:

"Section 41. * * * The district court of the United States for the District of Columbia shall have general jurisdiction in law and equity * * *."

Hence it seems clear that if other bases for equitable jurisdiction are present, the District Court had jurisdiction to grant the relief prayed.

The facts herein present a classical case of equitable jurisdiction, as well as a compelling occasion for its exercise. (1) Public officials, acting under color of authority, (2) are threatening to take action which will subject petitioners to irreparable injury, (3) which petitioners assert is unlawful and (4) for the redress of which they have no adequate remedy at law. *Ex Parte Young,* 209 U. S. 123, 52 L. Ed. 714, 28 Sup. Ct. Rep. 441. In addition, inasmuch as Section 4, Part II (a), of the Bituminous Coal Act of 1937 provides that the costs and sales realization reports of petitioners must be held by the various statistical bureaus as petitioners' confidential records, and inasmuch as petitioners submitted such reports to such statistical bureaus in confidence (R. 11), relying on these provisions as well as on the order of the Commission directing their submission and the forms on which such reports were required to be made (R. 10), there is thus presented a situation strikingly similar to one involving a trade secret wherein equity jurisdiction is invoked to prevent a breach of trust. Data such as that here involved has been held by this Court to be governed by the principles applicable to trade secrets and thus entitled to the protection of a court of equity.

Board of Trade v. *Christie Grain & E. Co.*, 198 U. S. 236, 49 L. Ed. 1036, 25 Sup. Ct. Rep. 637.

The Threat.

Respondents, purporting to act pursuant to an alleged authority contained in the Bituminous Coal Act of 1937, are threatening to disclose petitioners' records, showing in detail their costs of production and sales realization on bituminous coal produced and sold by them. This threat is evidenced by the ruling of the Commission of March 30, 1938 (R. 6), and by its order of June 1, 1938 (R. 6), and its orders of August 31, 1938 (R. 7, 8), directing the Secretary of the Commission as to the manner in which he is to carry out the ruling. That this threat is sufficient seems clear. *Ex Parte Young, supra, Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 56 L. Ed. 570, 32 Sup. Ct. Rep. 340.

The Irreparable Injury.

Although respondents in their motion to dismiss the complaint attack the allegations in the bill with respect to irreparable injury (R. 16), they by that motion admit all facts well pleaded, and as a result of those admissions it seems clear on this record that irreparable injury will result to petitioners if their cost and sales realization reports are disclosed in the manner threatened. That such reports constitute valuable property is not open to question. *Board of Trade* v. *Christie Grain & E. Co., supra.* See *International*

News Service v. *Associated Press*, 248 U. S. 215, 63 L. Ed. 211, 39 Sup. Ct. Rep. 68. The very fact that disclosure will result in such reports coming into the hands of those not entitled to see them, thus destroying petitioners' property in them, constitutes irreparable injury. *Board of Trade* v. *Christie Grain & E. Co., supra.*

Respondents, in paragraph 4 of their motion to dismiss the complaint (R. 16), make an indefensible assertion that petitioners are unable to show irreparable injury unless they allege whether they are high cost producers or low cost producers. The bill of complaint will show that whether they are the one or the other irreparable injury will be done to them if their cost reports are made public. This assertion of respondents comes down to the proposition that before petitioners are entitled to equitable relief they much disclose to the world the very matter as to the secrecy of which thy are praying this Court for protection. The mere statement of this proposition carries its own refutation.

Inadequacy of Remedy at Law.

The U. S. Court of Appeals for the District of Columbia in the previous aspect of this controversy, *Mallory Coal Co.* v. *National Bituminous Coal Commission*, 99 Fed. (2d) 399, has already held that the usual remedy at law, namely a suit in that court or a Circuit Court of Appeals pursuant to the judicial review provisions of the Act, was not available to petitioners, and petitioners cannot conceive of any other remedy at law which they might have invoked. Surely

petitioners could not have refused to submit their cost and sales realization data to the Statistical Bureau of the Commission and escaped the penalties for such refusal in a suit brought for their collection by a defense that after the Commission acquired this data, which petitioners concede it had authority to do under Section 4 II (a) of the statute, it intended to use such data in a manner forbidden by the statute. See *First National Bank* v. *Albright*, 208 U. S. 548, 52 L. Ed. 614, 22 S. Ct. Rep. 349. Even assuming that such a defense would have been valid, it could hardly be said to have been available to petitioners at the time their cost and sales realization reports were required to be submitted to the statistical bureau, for the first intimation petitioners had that the Commission intended to treat these reports otherwise than as confidential, did not come until almost nine months after they had turned these reports over to the Commission pursuant to its order (R. 5, 9, 10), and they certainly could not reasonably have been required to have anticipated the Commission's ruling in this respect, especially in view of the assuring statement in bold type appearing on the cost forms on which the required data was to be submitted.

The unavailability of the statutory judicial review under the Urgent Deficiencies Act was the very reason that the Circuit Court of Appeals, in *Shields* v. *Utah Idaho C. R. Co.*, 95 Fed. (2d) 911, held that there was no adequate remedy at law and hence that the District Court had jurisdiction to grant the injunction prayed for. The same reason is implicit in the decision of this court in that same case, *Shields, et al.*, v. *Utah*

Idaho C. Ry. Co., decided December 5, 1938. See also *Hudson & Manhattan Ry. Co.* v. *Hardy* (S. D. N. Y), 22 Fed. Supp. 105.

Although Not Required So To Do Petitioners Have Exhausted Their Remedies Before the Administrative Agency and Their Rights Will Be Destroyed if Determination Thereof Can Only Be Had on Review of a Final Order Fixing Prices.

In a case such as this, where the administrative agency has exceeded its statutory powers, it was not necessary for petitioners to seek redress in a proceeding before the Commission. It was expressly so held in *Skinner & Eddy Corp.* v. *U. S.*, 249 U. S. 557, 63 L. Ed. 772, 39 Sup. Ct. Rep. 375, where the Court said (563):

> "The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission. Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 49, 56 L. Ed. 83, 88, 32 Sup. Ct. Rep. 22; Louisiana & P. R. Co. v. United States, 209 Fed. 244, 251; Atlantic Coast Line R. Co. v. Interstate Commerce Commission, 194 Fed. 449, 451. The Sacramento Case (United States v. Merchants & Mfrs. Traffic Asso. 242 U. S. 178, 61 L. Ed. 233, 37 Sup. Ct. Rep. 24) was a case of this character. Compare Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 88, 92,

57 L. Ed. 431, 433, 33 Sup. Ct. Rep. 185; Southern P. Co v. Interstate Commerce Commission, 219 U. S. 433, 55 L. Ed. 283, 31 Sup. Ct. Rep. 298. The district court properly assumed jurisdiction of this suit."

But the record discloses that petitioners have, in fact, exhausted their administrative remedies. The first threat of the Commission to take the action complained of was in the form of a ruling of March 30, 1938 (R. 5). The petitioner, Mallory Coal Company, and others, filed a petition in the nature of a petition for rehearing, objecting to this ruling as erroneous (R. 6). The Commission, after hearing, overruled this petition by order of June 1, 1938, in which it directed the Secretary of the Commission to make the individual cost reports available for inspection by interested parties (R. 6). Petitioners cannot conceive of any further step that could have been taken by them to persuade the Commission that its construction of the Act was erroneous.

Neither can petitioners conceive of a situation wherein, upon review of a final order of the Commission fixing prices, the question of whether the Commission acted legally or illegally in disclosing their individual cost reports in the manner threatened, could be determined. Certainly petitioners could hardly be said to be aggrieved because a final price-fixing order of the Commission should appear to interested parties to be based on more extensive information than would be the case if these individual cost reports were not disclosed. Whether they are disclosed or not, the in-

formation upon which the Commission bases its order is the same, and it is inconceivable that the illegality of the Commission's action in disclosing these reports could infect the order and render it fatally defective. In any event, at the time the Commission issues its order fixing prices, the question of whether the disclosure of the cost reports was legal or illegal would certainly have become moot inasmuch as the minute they are disclosed the damage is done and cannot possibly be repaired.

It is submitted that in every case holding that before judicial review may be had of administrative action administrative remedies must be exhausted, all rights were saved for determination by the Court in the review proceeding except the alleged right to be free from the annoyance and expense of litigation, which this Court has held is no right at all. In this case secrecy of petitioners' cost reports had been specifically required by Congress, presumably on the theory that to disclose them would result in irreparable harm to producers in the coal industry. The ruling and orders of the Commission threatening to disclose these reports if carried out finally determines the rights of these petitioners, and the disclosure of such reports, in the manner threatened, would result in petitioners having no rights to save for judicial determination on final hearing.

Petitioners Are Not Seeking to Review Any "Order" of the Commission and the Threatened Invasion of Petitioners' Rights Is Not a Procedural Matter.

Petitioners' bill of complaint will demonstrate conclusively that they did not bring this action to have enjoined or set aside any order of the Commission. Their action was based on the theory that the Commission was threatening to do an act which was prohibited by the statute, that the order of August 31, 1938, as well as the ruling of March 30, 1938, were simply evidence of this threat, that if the threat were carried out they would suffer irreparable damage, and that the decision of the Court of Appeals in the *Mallory case, supra,* held that they had no remedy at law. If the Commission had been satisfied simply with its ruling of March 30th, such ruling would have constituted just as real a threat on its part as does the ruling, coupled with a series of orders telling the Secretary of the Commission how to carry out the ruling. It would seem a strange doctrine if it should be held that the availability or unavailability of equitable relief from administrative action depended on the number of documents the administrative agency issued and what it called them.

The opinion of the Court of Appeals cites *Federal Power Commission* v. *Metropolitan Edison Co.,* 304 U. S. 375, 82 L. Ed. 948, 58 Sup. Ct. Rep. 963; *United States* v. *Illinois Central R. R. Co.,* 244 U. S. 82, 61 L. Ed. 1007, 37 Sup. Ct. Rep. 584; and *Jones* v. *Securities and Exchange Commission* (C. C. A. 2), 79 F. (2d)

617, cert. denied 297 U. S. 705; in support of its contention that preliminary procedural orders of administrative agencies are not subject to judicial review. In each of those cases it will appear that the order there involved was really procedural in character. It in no sense finally determined anybody's rights. The action here, as evidenced by the ruling and the order involved in this case, on the contrary, is as final a determination of rights as a refusal of executive clemency a minute before the condemned is scheduled to be placed in the electric chair.

Furthermore, all that the cases cited hold is that preliminary procedural orders are not subject to judicial review under the usual statutory judicial review provision, found in the pertinent statute. Assuming, for a moment, that the "order" of August 31st is a preliminary procedural order, as the Court below says it is, it does not therefore follow that it is exempt from judicial scrutiny. This Court was very careful to make this clear in the *Metropolitan Edison case, supra,* in which it said:

> "With respect to other regulatory bodies, it has been held that mere preliminary or procedural orders are not within the statutes providing for *review by the Circuit Court of Appeals.*" (Italics ours.)

But this Court, in that very case, recognized that preliminary procedural orders of administrative bodies were not wholly exempt from judicial scrutiny when it reviewed and found adequate the provisions of the

statute there involved with respect to judicial enforcement of administrative subpoenas. And in *Myers* v. *Bethlehem Ship Building Corporation,* 303 U. S. 41, 82 L. Ed. 399, 58 Sup. Ct. Rep. 26, this Court recognized not only the propriety of but also the need for equitable relief in the case of preliminary procedural orders which finally determine rights when it said:

> "First. There is no claim by the Corporation that the statutory provisions and the rules of procedure prescribed for such hearings are illegal. * * *"

Nothing in the opinion in the *Myers case,* the *Metropolitan Edison case,* or in any other case so much as intimates that preliminary procedural orders, which finally determine rights and which to carry out would result in irreparable damage, may not be reviewed in some proceeding other than the usual one for statutory judicial review.

The Court of Appeals gives as reason for holding preliminary procedural orders not subject to judicial review under the usual statutory provision, the fact that every minor question which arose as to the propriety of administrative proceedings could be attacked in the courts, with the result that administrative adjudication would become virtually non-existent. Unquestionably this reason is a cogent one, but certainly can have no application where a preliminary procedural order is sought to be reviewed by a court of equity under its general equity jurisdiction. Under the usual statutory provision for judicial review, an

order of an administrative agency may be enjoined or set aside without any allegation of irreparable injury, and so if review can be had of a procedural order, under such a provision, it is undoubtedly true that the results prophesied by this Court might well become a reality. This certainly would not be the case, however, where jurisdiction of a court of equity is invoked, since irreparable damage as a result of unlawful action has to be both alleged and proved as well as inadequacy of legal remedy.

The Granting of Injunction Here Would Not Control the Exercise of Administrative Discretion and the Court Will Determine Whether the Statute Properly Construed Prohibits the Action Sought to be Enjoined.

The Court of Appeals for the District of Columbia held that the action sought to be enjoined involved a judgment based upon the exercise of discretion by an administrative agency in a matter properly within its jurisdiction, and that the statute being ambiguous, and the construction placed thereupon by the Commission being a possible one, injunctive relief is not a proper remedy at this time, although the question may be properly reviewed and determined on appeal from a final order.

As has already been pointed out and as is apparent on the face of the pleadings, a review and determination of the question as to the right to make public petitioners' cost and realization reports on appeal from a final order fixing prices, would be too late to protect petitioners' rights.

Petitioners also insist that the Act is not ambiguous, but that, as we hereafter show, when all of its provisions are considered, together with its legislative history, the will of Congress to preserve the secrecy of the cost and realization reports involved becomes beyond peradventure clear.

Petitioners certainly do not question the proposition that injunctive relief will not be given where the administrative agency lawfully acts "in a matter properly within its jurisdiction." It is insisted here, however, that the Bituminous Coal Commission, assuming to act under warrant of the statute, is transcending its bounds and unlawfully exercising the power of government against petitioners in a manner that invades their rights to private property. The holding of the Court in *Philadelphia Co.* v. *Stimson, supra,* is therefore directly applicable here. There the Court, after holding that where an officer, proceeding under an unconstitutional act to the irreparable loss of the complainant may be enjoined, further held:

> "And a similar injury may be inflicted, and there may exist ground for equitable relief, when an officer, insisting that he has the warrant of the statute, is transcending its power and thus unlawfully assuming to exercise the power of government against the individual owner, is guilty of an invasion of private property."

Nor do any of the cases cited by the lower Court sustain its holding that in such a case as this, the statute being ambiguous, and the construction placed

thereon by the Commission being a possible one, injunctive relief at this time is not a proper remedy in any event.

The first case cited by the lower court is that of *U. S. Ex Rel. Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, 47 L. Ed. 1074, 23 Sup. Ct. Rep. 698. That case involved an application for writ of mandamus against the Secretary of the Interior to compel him to vacate his decision rejecting an application for selection of public land. The Court held that the question decided by the Secretary was one within his jurisdiction and that Congress, having constituted the Land Department a special tribunal with judicial functions and with power to decide such questions, the writ of mandamus would not lie since mandamus will not be used to control the exercise of administrative or judicial discretion.

The case of *Louisiana* v. *McAdoo,* 234 U. S. 627, 58 L. Ed. 1506, 34 Sup. Ct. Rep. 938, the next case cited by the lower Court, involved an application of the State of Louisiana to the Supreme Court for permission to file a petition against the Secretary of the Treasury, requiring him to change a ruling as to the tariff to be collected on sugar. The Court held that the duties imposed upon the Secretary "are executive, and involve the exercise of judgment and discretion," and that under these circumstances the Court would not control the exercise of such judgment and discretion because "interference in such a case would be to interfere with the ordinary functions of Government."

The next case cited is *New Orleans* v. *Paine,* 147 U. S. 261, 37 L. Ed. 162, 13 Sup. Ct. Rep. 303, which was a suit brought by the City of New Orleans against the Deputy Surveyor General of the United States, to enjoin him from dividing into sections land alleged to belong to the plaintiff under prior grants. This case therefore also involved the control by the courts of a construction of the exercise by the Land Department of its powers and duties under the statute. However, there had been no final determination by the Land Department and the Court held:

> "The judicial power will not interpose by mandamus or injunction to limit or direct the action of departmental official in respect to pending matters within their jurisdiction and control."

The lower court also cites *Wilbur* v. *U. S. Ex Rel. Kadrie,* 281 U. S. 206, 74 L. Ed. 809, 50 Sup. Ct. Rep. 320. This case involved an application for mandamus to control the decision of the Secretary of the Interior revoking a decision of a predecessor in office as to the right of certain persons to share in the distribution of tribal funds. The Court held that if the Secretary of the Interior in 1927 was without power to reconsider and revoke the decision of his predecessor in 1919, the relators would be entitled to relief by mandamus but that here the authority was neither exhausted nor terminated because it was a continuing authority. The Court said:

> "The duties of executive officers, such as the Secretary of the Interior, usually are connected

with the administration of statutes which must be read and in a sense construed to ascertain what is required. But it does not follow that these administrative duties all involve judgment or discretion of the character intended by the rule just stated. Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus."

It will be seen that the Court has consistently held that it will not control the action of executive officers by mandamus where the authority of such officer is not free from doubt. On the contrary, however, the Court has always held, as in *Philadelphia Co.* v. *Stimson, supra,* that where an officer or administrative agency is alleged to have transcended the bounds of statutory authority and unlawfully invaded the rights of private property of the plaintiff, equity has jurisdiction to enjoin, and in such action the Court will determine for itself the proper construction of the Act.

The case of *U. S. Ex Rel Chicago Great Western* v. *I. C. C.,* 294 U. S. 50, 79 L. Ed. 752, 55 Sup. Ct. Rep. 326, which is the last decision of this Court cited by the lower court, makes clear the distinction for which we

here contend and instead of supporting the holding of the lower court that in a case such as this, the statute being thought to be ambiguous, and the construction placed thereon by the Commission being a possible one, injunctive relief will be denied, does, in fact, support our position. In that case the Interstate Commerce Commission had declined to take jurisdiction and suit was brought for writ of mandamus requiring it to take jurisdiction. The Court there said:

> "The ultimate question, then, upon the answer to which the decision of this case must turn, is whether, in holding that the statute granted it no authority to act in the premises, the Commission was so plainly and palpably wrong as matter of law that the writ should issue. It is to be noted that the solution of this question does not depend upon whether in a proper case this court would reach the same conclusion as that of the Commission. If that body had taken jurisdiction and granted relief a remedy would have been available to the respondents by the filing of a bill in equity to set aside the order and to enjoin its enforcement. Had the matter been thus presented it would have been incumbent upon the courts, however doubtful the question, to decide it. But the order here made was negative in form and substance,—the refusal of relief,—and the remedy by suit in equity was therefore not available to the petitioners."

It will be seen that this Court there holds, as it had in the cases just reviewed, that it would not by mandamus require the Commission to act when it had de-

clined to do so unless the Commission was "plainly and palpably wrong as a matter of law," but that the Court further held that if the Commission had taken action not only would a remedy be available to the plaintiffs by bill in equity to enjoin such action, but that "had the matter been thus presented it would have been incumbent upon the courts, *however doubtful the question,* to decide it." (Italics ours.)

Certainly this Court has always held that where an officer or agency of government has taken or threatened final action which will result in irreparable injury to the citizen, the Court in a proper proceeding will determine whether the officer or agency is acting within the power conferred or is transcending that power and unlawfully assuming the exercise of the power of government against the citizen, *American School of Magnetic Healing* v. *McAnulty,* 187 U. S. 194, 47 L. Ed. 90, 23 Sup. Ct. Rep. 33; *Ex Parte Young, supra; Philadelphia Co.* v. *Stimson, supra; Waite* v. *Macy,* 246 U. S. 606, 62 L. Ed. 892, 38 Sup. Ct. Rep. 395; *Shields, et al.,* v. *Utah-Idaho Central Ry. Co., supra.* Nothing in the cases relied upon by the lower court sustain a different conclusion. All of them can be distinguished either on the ground that the action was not final or that there was no invasion of rights but rather a withholding of a privilege, or that the officer or agency was exercising a discretion or judgment granted by the statute.

In *Waite* v. *Macy, supra,* this Court sustained an injunction against a Board of Import Appraisers, en-

joining them from applying certain tests which resulted in the exclusion from importation of tea containing coloring matter. It was contended that the coloring matter violated the standards "of purity, quality and fitness for consumption," provided by the statute, and that whether or not it did so violate such standards was a question for determination by the Board, and this Court said:

> "No doubt it is true that this court cannot displace the judgment of the Board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality, or fitness for consumption. Morrill v. Jones, 106 U. S. 466, 27 L. Ed. 267, 11 Sup. Ct. Rep. 423; United States v. United Verde Cooper Co., 196 U. S. 207, 215, 49 L. Ed. 449, 452, 25 Sup. Ct. Rep. 222; United States v. George, 228 U. S. 14, 21, 57 L. Ed. 712, 715, 33 Sup. Ct. Rep. 412."

In asserting the right to control the action by injunction, the Court in conclusion said:

> "The Secretary and the board must keep within the statute (Merritt v. Welsh, 104 U. S. 694, 26 L. Ed. 896), which goes to their jurisdiction (see Interstate Commerce Commission v. Northern P. R. Co., 216 U. S. 538, 544, 54 L. Ed. 608, 609, 30 Sup. Ct. Rep. 417), and we see no reason why the restriction should not be enforced by injunction, as it was, for instance, in Bacon v. Rutland R. Co., 232 U. S. 134, 58 L. Ed. 538, 34 Sup. Ct. Rep. 283;

Philadelphia Co. v. Stimson, 223 U. S. 605, 620, 58 L. Ed. 570, 576, 32 Sup. Ct. Rep. 340; Santa Fe P. R. Co. v. Lane, 244 U. S. 492, 61 L. Ed. 1275, 37 Sup. Ct. Rep. 714. We are satisfied that no other remedy, if there is any other, will secure the plaintiffs' rights."

The case at bar is on all fours with the foregoing case. Here, as there, the agency sought to be enjoined claims to act pursuant to the statute and claims the right to interpret the statute so as to give it the power sought to be exercised, but here, as there, the claim is made that the statute, properly construed, does not give the power to take the action sought to be enjoined, but such action constitutes a usurpation of power to the injury of the complaining party.

It cannot be seriously argued that by the provisions of the Bituminous Coal Act Congress intended to grant, or did grant, the Bituminous Coal Commission arbitrary power to reach any conclusion it chose in interpreting the statute. Presumably the statute, like other statutes, is susceptible of authoritative definition. If not, then it is void for want of certainty. *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 517, 41 Sup. Ct. Rep. 298. The intent of Congress, as expressed in the statute, must govern. Petitioners concede, for the purpose of this case, that Congress could have given the Commission the power to disclose or not to disclose the cost reports as the public interest dictated. If Congress had so provided, there is no question but what an injunction enjoining their disclosure would be one seeking to control the exercise of adminis-

trative discretion. The question here is whether there was a will to go so far, and the statute itself, the pertinent provisions of which are set forth herein, gives the answer. If the Commission is permitted to put an improper construction on the statute, and in doing so utterly to destroy the very rights which the statute sought to protect, and that construction is to be considered beyond the reach of the courts merely because the statute may require construction, then the will of Congress is thwarted and to that extent the Commission is exercising not a delegated but a usurped authority. As was stated by this Court in *I. C. C.* v. *C. N. O. & T. P. R. Co.*, 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. Rep. 896:

> "The power given is the power to exercise and enforce, not to legislate."

Under No Circumstances Can Act Be Said to Authorize Disclosure, in Wholesale Manner Proposed, of Code Members' Cost Reports in the Course of Proceedings to Fix Prices.

The Bituminous Coal Act of 1937 provides for the promulgation of a "Bituminous Coal Code," which sets forth the rights, duties and obligations of those producers of coal who accept such Code. Section 4 of the Act provides in the first three paragraphs thereof, as follows:

> "The provisions of this section shall be promulgated by the Commission as the 'Bituminous Coal Code,' and are herein referred to as the code.

"Producers accepting membership in the code as provided in section 5 (a) shall be, and are herein referred to as, code members, *and the provisions of such code shall apply only to such code members,* except as otherwise provided by subsection (h) of part II of this section.

"For the purpose of carrying out the declared policy of this Act, the code shall contain the following conditions and provisions, which are intended to regulate interstate commerce in bituminous coal *and which shall be applicable only to matters and transactions in or directly affecting interstate commerce* in bituminous coal." (Italics ours.)

It was as members of this Code and pursuant to the terms thereof, that petitioners here filed the cost reports, which the Commission now threatens to make public. Under Part 1, Section 4—Organization—the Act provides for the organization of district boards. Part II—Marketing—of Section 4, provides as follows:

"The Commission shall have *power to prescribe for code members* minimum and maximum *prices,* and marketing rules and regulations, as follows:

"(a) *All code members shall report* all spot orders *to such statistical bureau* hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and *such other information concerning the preparation, cost, sale and distribution of coal as the Commission may authorize or require.*

All such records shall be held by the statistical bureau as the confidential records of the code member filing such information.

"For each district there shall be established by the Commission a *statistical bureau* which shall be operated and maintained as an agency of the Commission. Each statistical bureau shall be under the direction of a manager, who shall be appointed by the Commission. *No producer, employee, or representative of a producer, and, except as the Commission may specifically approve, no member of a district board or employee or representative thereof shall be an employee of any statistical bureau.*

"Each district board shall, from time to time on its own motion or when directed by the Commission, propose minimum prices free on board transportation facilities at the mines for kinds, qualities, and sizes of coal produced in said district, and classification of coal and price variations as to mines, consuming market, areas, values as to uses and seasonable demand. Said prices shall be proposed so as to yield a return per net ton for each district in a minimum price area, as such districts are identified and such area is defined in the subjoined table designated 'minimum-price-area table,' equal as nearly as may be to the weighted average of the total costs, per net ton, *determined as hereinafter provided,* of the tonnage of such minimum price area. The computation of the total costs shall include the cost of labor, supplies, power, taxes, insurance, workmen's compensation, royalties, depreciation and depletion (as determined by the Bureau of Internal Revenue in the computation of the Federal income tax) and

all other direct expenses of production, coal operators' association dues, district board assessments for Board operating expenses only levied under the code, and reasonable costs of selling and the cost of administration." (Italics ours.)

It is important to notice the position in the Act of the provision imposing a confidential character upon the cost and realization records filed by Code members with the Statistical Bureaus. The first sentence of Part II of Section 4 grants to the Commission power to prescribe minimum and maximum prices for Code members in the manner thereafter set out. The next sentence of Part II requires Code members to report to the proper Statistical Bureau *inter alia* "such other information concerning the * * * cost, sale, and distribution of coal as the Commission may authorize or require." Then immediately follows the sentence: "All such records (*i. e.,* those filed with the Statistical Bureau) shall be held by the Statistical Bureau as the confidential records of the Code member filing such information." The juxtaposition of these three sentences would seem to indicate clearly that Congress intended that, in exercising the power conferred in the first sentence to fix prices, the Commission should respect the confidential character of these reports. Otherwise, the third sentence might well have been relegated to some other section where it would not be tied up with exercise of the price-fixing powers of the Commission.

It will therefore be seen that the Code members filed the cost reports here in question pursuant to the

terms of a Code which they had formally accepted, which Code is in the terms of the statute, and provided that such reports should be held "as the confidential records of the Code member filing such information."

This feature of the Act deserves special mention. The Code is not merely one of several sections of a statute of general application. It is more than that —it is the part of the Act which relates peculiarly to Code members. It is singled out from the Act by being required, by Section 5, to be promulgated as a separate document, which is sent to all producers for signature and acknowledgment. A producer who accepts in this manner becomes a Code member. One who does not, incurs none of the liabilities of the Code and is not subject thereto at all. If he prefers to pay the tax provided in Section 3 (b), a producer can remain unaffected by the Code. Hence, it is fair to say that Congress intended that a Code member will find the rights and duties peculiar to him as a Code member set out in the document which he signs. He finds in this document an unqualified statement that the information he files with the Statistical Bureaus to enable the Commission to carry out its price-fixing duties shall remain his confidential records. Surely, Congress cannot have intended that this unqualified statement should be entirely emasculated by the vague and uncertain exception set out in Section 10 (a), a portion of the Act which is not required to be brought to his special attention at all and which by its terms

is applicable to producers as distinguished from Code members.

Exception in Section 10 (a) Does Not Authorize Wholesale Disclosure of Cost Reports in Course of Proceedings to Fix Prices.

We wish to make it clear at this point that petitioners do not contend that there are no circumstances under which their cost reports, filed with the Statistical Bureaus under Section 4 II (a), may be disclosed pursuant to the exception in Section 10 (a). We do contend that in the course of the price-fixing process the whole scheme of the Act indicates beyond peradventure of doubt that they are not to be disclosed, and never in the wholesale manner here proposed.

The question may be raised, under what circumstances the exception in Section 10 (a) can be applied if it does not permit the general disclosure of the individual cost reports in a hearing seeking to ascertain the weighted average cost used as a basis for fixing minimum prices. While we consider it necessary only to establish that the exception is not susceptible to the construction which the Commission has put upon it in ordering the cost returns made available for inspection, yet we point out that there are numerous instances in which the exception will nevertheless have application, but before proceeding to discuss these instances it would seem desirable to discuss what was intended by Congress when it wrote the exception in Section 10 (a).

Inasmuch as the question involved is not entirely free from doubt, undoubtedly this Court may resort to statutes in *pari materia* as an aid to construction. *Vane* v. *Newcombe*, 132 U. S. 220, 33 L. Ed. 310, 10 Sup. Ct. Rep. 60.

The Bituminous Coal Act of 1937 was enacted as a substitute for the Bituminous Coal Conservation Act of 1935 (49 Stat. 991) and many of the sections of the two acts are substantially identical. In the 1935 Act the exception in Section 10 (a) reads as follows:

> "Except where such disclosure is warranted by a controversy with the producer over any order of the Commission * * *."

In the 1937 Act this exception was changed to read as follows:

> "Except where such disclosure is made in evidence in any hearing before the Commission or any court * * *."

The congressional proceedings throw no light on why this change was made. It is important to note that under the 1935 Act disclosure could be made in connection with a controversy with a producer only after the Commission had issued an order. Obviously this exception was entirely too limited because there might be any number of occasions where a controversy with a particular producer would arise in the course of proceedings before the Commission prior to the time the Commission issued any order. This would be true, for example, where the Commission had charged a producer with filing a false report. Hence it seems reasonable to

conclude that the change made in the exception by the 1937 Act was made simply for the purpose of authorizing disclosure of a cost report of a particular producer prior to the issuance by the Commission of any order, but still only where there was a controversy with such producer. That this construction is a reasonable one is borne out by the consideration that no report of any producer would be made public unless that producer took it upon himself to do something which would result in his having a controversy with the Commission. In other words, the disclosure or non-disclosure of his particular cost report would rest entirely upon himself. Any other construction would produce a ludicrous result, namely that these reports were to remain confidential only so long as the Commission chose to postpone the exercise of its primary function—price fixing—and then they were to be opened wholesale to the prying eyes of the world.

It still remains to consider in what instances disclosure of a particular producer's individual cost report might have been made by the Commission under the provisions of the 1935 Act, since, as we contend, those instances remain of the same general character under the 1937 Act. The first of these would be on an issue of confiscation where maximum prices are prescribed (Sec. 4 II (c)). Under the 1937 Act the merit of an allegation of confiscation might be determined while the Commission still had control of the proceeding, *i. e.*, before it issued an order, whereas this would not have been possible under the 1935 Act. There might also be an issue of confiscation under minimum

prices. There could be a controversy raised by a charge that the individual Code member had filed insufficient or false information, contrary to his duty as a Code member (Sec. 4 II (k)). At any rate, it appears that there are any number of instances where, in the course of proceedings before the Commission, there might arise a controversy with a particular producer to resolve which it would be necessary to disclose *his* cost report.

Section 10 (a) Does Not Authorize Commission to Require Submission of Cost Reports Used in Price-Fixing Process, and Fact that Commission Purported to Act Under Section 10 (a) Cannot Destroy Code Members' Rights.

In requiring the filing of cost and realization reports, the Commission, however, purported to act under Section 10 (a). This section is no part of the Code and applies to "producers." Section 10 (a) provides as follows:

> "The Commission may require reports from *producers* and may use such other sources of information available as it deems advisable, and may require producers to maintain a uniform system of accounting of costs, wages, operations, sales, profits, losses, and such other matters as may be required in the administration of this Act. No information obtained from *a producer* disclosing costs of production or sales realization shall be made public without *the* consent of *the producer* from whom the same shall have been obtained, except where such disclosure is made in evidence

in any hearing before the Commission or any court and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission." (Italics ours.)

Because the Commission purported to require the submission of cost reports under this section and not under Section 4 II (a), it now claims the right to disclose, pursuant to the exception in Section 10 (a), reports made by Code members. We have already shown that the legislative history of the exception in Section 10 (a) shows beyond doubt that it is strictly limited in its application, and in no event authorizes disclosure in the wholesale manner here proposed. There still remains to consider, however, (1) whether Section 10 (a) authorizes the Commission to require the submission to it of cost reports used in the price-fixing process, and (2) whether the Commission, by a disingenuous citation of Section 10 (a) as its authority, has thereby tricked petitioners out of their rights.

It will be noted that Section 10 (a) does not expressly provide that the Commission may require producers to file cost and realization reports as is required of Code members in Section 4, II (a). The power is "The Commission may require reports from producers." Inasmuch as the Commission fixes prices only for Code members it cannot be that the Act means that the Commission should require, for price-fixing purposes, reports from producers other than Code

members. Therefore the reports contemplated by Section 10 (a) must be reports containing information that the Commission may require in order to carry out its duties under the Act, other than its price-fixing duties.

There are numerous such duties, some of which are enumerated in Section 14, and include: investigation of the economic operation of mines, with a view to the conservation of the natural coal resources; safe operation of mines for the purpose of minimizing working hazards; the lowering of distributing costs for the benefit of consumers; and the control of production of coal including allotment of output to districts and producers within such districts, and holding hearings thereon. By paragraph (b) of Section 14, the Commission is required to report the result of its investigations on these matters, together with its recommendations, to the Secretary of the Interior for transmission by him to Congress. Again, by Section 16, the Commission is authorized to make complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to transportation of coal. Under Section 4-A it is the duty of the Commission, either upon petition or upon its own motion, to determine, after hearing, whether coal sold in intrastate commerce or whether producers selling only in intrastate commerce should be subject to regulation under the Code. The information obtained in Section 10 (a) would be of use in determining these questions. Also by Section 2 (a), the Commission is

authorized to conduct research into numerous problems affecting the industry, and in the discharge of these various duties information acquired under Section 10 (a) would be useful.

At any rate, close study of the statute indicates that the Commission has numerous duties other than those set out in the Code. When we look at Section 10 (a) we find a general power to require reports of producers, as distinguished from Code members, and it is reasonable to suppose that Congress intended this power to be used in connection with the performance by the Commission of its duties other than those set out in Section 4. This construction is further justified by the fact that the power of the Commission to require reports from producers, contained in Section 10 (a), could be excised completely from the statute without interfering in the slightest with the performance by the Commission of its duties under Section 4, that section containing complete authority and power for the Commission to gather information essential to the performance of its duties there set forth. On the other hand, the Commission would be unable properly to perform its duties under these other sections, to which attention has been called, without the authority contained in Section 10 (a) to require reports from producers.

This construction as to the application of Section 10 (a) is further borne out when resort is had to legislative history. Section 4, Part II, (a) of the 1935 Act required that the producers' cost reports be submitted

to the District Boards or to Statistical Bureaus which the District Boards were authorized but not required to establish. The District Boards had no connection with the Commission except that the Commission exercised a degree of supervision over their activities in certain particulars not here involved. Hence under the 1935 Act the producers' individual cost reports, upon the basis of which weighted average cost was determined, never came either into the possession or under the official scrutiny of the Commission. Undoubtedly the 1937 Act established Statistical Bureaus under the control of the Commission for the receipt of these cost returns in order further to insure their secrecy, inasmuch as the district board was composed of coal operators, except for one labor representative, and it was feared that these coal operators would have access to the reports of their competitors.

This is borne out by the testimony of the Hon. Charles S. Hosford, then Chairman of the National Bituminous Coal Commission, in the hearings on S-1, 75th Congress, before the Senate Committee on Interstate Commerce, and found at page 14 of the transcript of such hearings.* In explaining the changes proposed Chairman Hosford testified in part as follows:

"* * * One change from the administrative standpoint is that the statistical bureaus, which are provided to be set up in the various districts, are

*The right to refer to the testimony before a committee of Congress of an official charged with the administration of an Act in order to determine the purpose of changes proposed in an Act and thereafter made, is sustained in an able opinion by Judge Learned Hand in *Securities & Exchange Commission* v. *Robert Collier & Co., et al.*, 76 Fed. (2d) 939. See also *Smith* v. *Gilliam* (D. D. Ky.), 282 Fed. 628; *Suckowski* v. *Norton* (D. C. Pa.), 16 F. Supp. 677.

made part of the Coal Commission's organization and are no longer a part of the district board of the industry's organizations. That was done for two reasons. When the Carter case was heard, one of the objections made to various provisions of the bill was that under that plan confidential information of individual coal producers was submitted to a statistical bureau set up by a district board, and as a result such confidential information might fall into the hands of competitors. Then, again, there have been doubts at times as to whether in all cases the statistical bureaus operated by the district boards completely met the requirements of the Commission as to the work to be performed by them."

It is now contended that the very Congress which made this change in the Act to further strengthen the assurance of secrecy of the reports of Code members, intended, by another change made by it in an exception to another provision of the Act, to destroy the very secrecy which the first change was made to preserve.

It is important to bear in mind that the general authority granted to the Commission by Section 10 (a) of the 1937 Act, to require reports from producers is word for word the same as the corresponding provisions of Section 10 (a) of the 1935 Act, but it is apparent that Congress never intended, by section 10 (a) of the 1935 Act, to give the Commission power to require cost reports from producers to be used as the basis for determining weighted average costs, because it had already provided that such reports be submitted to the District Boards, which were required to hold

them "as the confidential records of the Code member." There was thus no ambiguity in this connection in the 1935 Act because Section 4 II (a) and Section 10 (a) obviously related to two entirely different matters, involving two separate and distinct agencies. It can hardly be seriously argued that when Congress, in the 1937 Act, required the reports used in the price fixing process to be submitted to the Statistical Bureaus instead of the District Boards, and at the same time made no change in the language in the first sentence of Section 10 (a), it intended to change the whole scope of Section 10 (a) and to give the Commission authority *under that section* to require the submitting to it of the cost reports used in the price fixing process. To impute to Congress such an intention would be to impute to it the further intention to over-ride the specific provisions of Section 4 relating to the confidential nature of these reports.

An argument was made in the Court below by counsel for respondents, to the effect that since the Commission, in its Order No. 15 requiring the filing of cost and realization data by coal producers, purported to act under the authority of Section 10 (a), therefore the provisions contained in that section relating to the disclosure of such information furnish the measure of a Code member's rights, and hence the provisions in Section 4 II (a) unqualifiedly prohibiting disclosure are not applicable.

This argument is utterly lacking in substance. As we have undertaken to show, Section 10 (a) cannot be the measure of a Code member's rights. Code members are under a positive and express duty, set out in

Section 4 II (a), to file with the proper Statistical Bureau such information as to costs and realization as the Commission may authorize or require. The important fact is that the Commission, by its Order 15, did require the filing of such information. It is immaterial whether the Commission purported to act under Section 10 (a) or Section 4 II (a). So far as Code members are concerned the only question which confronted them, when called upon to file the reports, was whether any section authorized the Commission to require such filing. The cost forms stated on their face that the information was required under the terms of the Act and was "therefore confidential," without referring to any particular section of the Act. Turning to the Code they had signed, they found this authority in clear terms in Section 4 II (a), and they would not have been justified in declining to file such reports because the Commission cited, in Order 15, the wrong section of the Act as its authority. Clearly, Order 15 would have been good if the Commission had cited no section of the Act as its authority. And if the argument made by counsel is valid, then the Court will be required to upset a long line of cases decided by this Court, which, ever since *Veazie Bank* v. *Fenno,* 8 Wall. 533, 19 L. Ed. 482, has held that the validity of an Act of Congress is not to be measured by the particular power in the Constitution under which Congress purported to act, but by the power, if any, which authorizes the substance of what was done, regardless of its form. Also if such argument is valid, then it is fair to say that two other conclusions will follow: first, that each admin-

istrative body must, in each administrative order, cite properly the section of the statute specifically authorizing its proposed action, or imperil the validity of its action; and, second, that by disingenuous citation of inapplicable sections of the statute, administrative bodies could trick persons subject to regulation out of their rights. We cannot believe that this Court will so sacrifice form to substance as to uphold any such legal casuistry.

To Construe Act as Authorizing Wholesale Disclosure of Cost Reports of Code Members Violates Two Established Rules of Construction, and Renders Useless Elaborate Provisions Made by Congress to Insure Secrecy.

Petitioners insist that among the immunities which they obtain for assuming the obligations of Code members is the immunity from wholesale disclosure in the manner proposed of their individual cost and realization reports; that the Code expressly so provides and the Code is in the terms of the statute. They further insist that to construe the exception contained in Section 10 (a) so as to authorize a general disclosure of these confidential reports not only violates their rights under the statute and the Code, but also violates two well established rules of construction: (a) That where possible an Act must be construed so as to give force and effect to each of its provisions and to avoid, if may be, any construction which implies that the Legislature was ignorant of the meaning of the language it employed. *Township of Montclair* v. *Ramsdell*, 107 U. S. 147, 27 L. Ed. 431, 2 Sup. Ct. Rep. 391;

Peck, et al., v. *Jennes, et al.*, 7 How. 612, 12 L. Ed. 841; and (b) "Exceptions from a general policy which a law embodies should be strictly construed; that is, should be so interpreted as not to destroy" the general policy to which it is an exception. *Spokane & Inland Empire R. Co.* v. *United States*, 241 U. S. 344, 60 L. Ed. 1037, 36 Sup. Ct. Rep. 668. See also *U. S.* v. *Ewing*, 140 U. S. 142, 35 L. Ed. 388, 11 Sup. Ct. Rep. 743.

The Act sets up elaborate machinery to protect the confidential nature of the individual reports of code members. It provides for Statistical Bureaus, to which such reports shall be made, and provides that "all such records shall be held by the Statistical Bureau as the confidential records of the code member filing such information." It provides (see pp. 58-61) that the district boards shall determine "*from cost data* submitted by the proper Statistical Bureau of the Commission" the weighted average of the total costs of the ascertainable tonnage produced in the district in the calendar year 1936, and adjust same to reflect certain changes or trends, and that "Such determination and the computations upon which it is based shall be promptly submitted to the Commission by each district board in the respective minimum price area" and that "The Commission shall thereupon determine the weighted average of the total costs of the tonnage for each minimum price area in the calendar year 1936", also adjusted to reflect certain changes and trends.

It will be seen that the Act fairly breathes secrecy with respect to the individual cost data of code members. No one is to see it except the Statistical Bureau,

which shall hold it "as the confidential records of the Code member filing such information." The Act then proceeds to provide that "no producer, employee, or representative of a producer, and, except as the Commission may specifically approve, no member of a District Board or employee or representative thereof shall be an employee of any Statistical Bureau," thereby clearly indicating that the District Boards shall not have knowledge of the records which the Statistical Bureau is to hold as confidential.

On the other hand, the District Boards are composed of coal producers, except one member who is a representative of Labor. Why should Congress have been at pains to provide that the reports should be made to the Statistical Bureau, that such Bureau should hold them as the confidential records of the Code member, that no one connected with the coal industry shall be on the Statistical Bureau, that the District Boards should make their determination "from cost *data* submitted by the proper Statistical Bureau of the Commission," that the Commission should make its determination from the figures and computations submitted to it by the District Boards, if, by the exception to the rule in Section 10 (a), the whole elaborate design to insure secrecy was to be destroyed by an order of the Commission when it came to hold hearings to establish minimum prices? Such a construction imputes to Congress either an intention to mislead and deceive or ignorance as to the meaning of the exception in Section 10 (a). Can it be that Congress intended, after setting up such elaborate machinery to protect the con-

fidential nature of these reports of code members, that the Commission should or could nullify the operation of such machinery and defeat the purpose thereof by simply ordering all such reports made available for inspection?

Why should Congress have provided, as it did in Section 4 II, (a), that "the weighted average figures of total cost, determined as aforesaid, shall be available to the public", if it intended that the individual returns from which such weighted average figures are computed should themselves be available for public inspection? Again, why should Congress have provided, as it did in the exception to Section 10 (a), applicable to producers "that such information may be compiled in composite form in such manner as shall not be injurious to the interest of any producer, and, as so compiled, may be published by the Commission" if it intended to give to the Commission authority to make public all the individual returns whether or not injurious to the interest of any producers? Finally, why should Congress have provided, as it did in Section 4 II (a), that the reports of Code members "shall be held by the Statistical Bureau as the confidential records of the Code member filing such information" if it extended by the exception in Section 10 (a) that the Commission should make them public wholesale? In the light of all these provisions running throughout the Act, it is submitted that the construction of the exception in Section 10 (a) contended for by the respondents is absurd.

It is therefore submitted that making available for inspection the individual cost and realization returns of all Code members in the manner proposed does violence not only to the right of Code members under the Code and to numerous specific provisions of the Act, but to the spirit and purpose which run throughout the Act; and that the Court may not, under any recognized rule or theory of construction, so construe the exception, which is ambiguous at best, as to cause this result. *Perrine* v. *Chesapeake & Delaware Canal Co.*, 9 How. 172, 13 L. Ed. 92.

In No Event Does Act Authorize Treatment of Petitioners' Cost Reports in Manner Here Proposed.

It is important to bear in mind what the Commission proposes to do with the petitioners' cost reports herein. As appears from the Commission's order of August 31, 1938 (R. 7, 8), the Commission has introduced in evidence a compilation of the cost data for each district, and it now proposes to make petitioners' and other producers' cost reports available *for inspection* and for introduction in evidence as bearing on the correctness of the compilation.

By no stretching of the language or process of construction can Section 10 (a) of the Act, quoted above, be said to authorize this unique procedure. The nondisclosure provision of that section provide:

> "No information obtained from a producer disclosing costs of production or sales realization shall be made public without the consent of the pro-

ducer from whom the same shall have been obtained, *except where such disclosure is made in evidence in any hearing before the Commission* or any court and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission." (Italics ours.)

Even construing these provisions in the manner most favorable to respondents, which construction we have already shown brings about a ridiculous result, disclosure can be deemed to be authorized *only where such disclosure is made in evidence* in a hearing before the Commission. But the Commission is not satisfied with this limitation on its authority and in order to support its proposed action invokes a rule, of which it is convinced Congress must have been aware and in spite of its efforts to make these reports confidential tacitly approved, that where it would not be practicable to introduce in evidence a mass of documents, an expert may summarize them if the originals are available for inspection. Then by giving the results of this rule a name—"constructive introduction in evidence"—the Commission considers itself absolved from any charge of not complying with the statute.

It is clear that Congress did not so intend, for it would be ludicrous to assume that Congress would create such detailed and elaborate machinery for insuring the secrecy of these cost reports if it intended that the moment the Commission initiated a hearing in connection with its most important function under

the Act—price-fixing—the Commission was to open every single one of them to the prying eyes of anyone who perchance was sufficiently desirous of seeing them to go to the trouble of mailing a piece of paper to the Commission designated as a notice of appearance.

Cost Reports Will Have No Bearing Whatsoever on Issue in Respect of Which Commission Intends to Use Them.

Assuming, without conceding that the Act does authorize the Commission with respect to some hearings either (1) to introduce petitioners' cost reports in evidence wholesale; or (2) to make them available wholesale for inspection and introduction in evidence, it does not therefore follow that the Act authorizes the Commission to do so in this hearing.

It could not be seriously contended, for example, that in a hearing held for the purpose of determining whether the territorial boundaries of a district should be revised, as is required in Section 4, Part I, the Commission would have authority to introduce petitioners' cost reports in evidence. The reason is obvious—the reports would have no relevancy to the question under determination. This is but an exaggerated example illustrating the contention we now make that the cost reports would have no bearing whatsoever on the issue in respect of which the Commission intends to use them.

The individual cost reports, if introduced in evidence at the present stage of the proceeding before the Commission, could have bearing on but two issues:

(1) Did the Commission, did the District Board, did the Statistical Bureau perform their respective duties in accordance with the mandates of the statute, and (2) are the individual cost reports themselves correct, *i. e.*, do they truly reflect the cost of production at the mines to which they relate? It is extremely important to bear in mind that the ruling of the Commission of March 30, 1938, recites that the cost reports will be made available for inspection and introduction in evidence as bearing solely on but a part of the first issue, viz., to support its and the District Boards' cost determinations. See also Commission's order of August 31, 1938 (R. 7, 8). Hence the question arises, have such reports any relevancy in connection with that issue?

The duties of the Commission, of the District Boards, and of the Statistical Bureau under the Act, so far as they relate to the present proceedings, are to be found in Section 4, the applicable portions of which are quoted below:

> "(a) All code members shall report all spot orders to such statistical bureau hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the preparation, cost, sale and distribution of coal as the Commission may authorize or require. All such records shall be held by the statistical bureau as the confidential records of the code member filing such information.
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> * * * * * * * *

"Each district board shall, from time to time on its own motion or when directed by the Commission, propose minimum prices free on board transportation facilities at the mines for kinds, qualities and sizes of coal produced in said district, and classification of coal and price variations as to mines, consuming market areas, values as to uses and seasonal demand. Said prices shall be proposed so as to yield a return per net ton for each district in a minimum price area, as such districts are identified and such area is defined in the subjoined table designated 'minimum-price-area table,' equal as nearly as may be to the weighted average of the total costs, per net ton, *determined as hereinafter provided,* of the tonnage of such minimum price area.

* * * * * * * *

"As soon as possible after its creation, each district board shall determine, *from cost data submitted by the proper statistical bureau* of the Commission, the weighted average of the total costs of the ascertainable tonnage produced in the district in the calendar year 1936. The district board shall adjust the average costs so determined, as may be necessary to give effect to any change in wage rates, hours of employment, or other factors substantially affecting costs, exclusive of seasonal changes, so as to reflect as accurately as possible any change or changes which may have been established since January, 1936. Such determination and the computations upon which it is based shall be promptly submitted to the Commission by each district board in the respective minimum-price area. The Commission shall thereupon determine

the weighted average of the total costs of the tonnage for each minimum-price area in the calendar year 1936, adjusted as aforesaid, and transmit it to all the district boards within such minimum-price area. Said weighted average of the total costs shall be taken as the basis, to be effective until changed by the Commission, for the proposal and establishment of minimum prices.

* * * * * * * *

"(b) District boards shall, under the rules and regulations established by the Commission, coordinate in common consuming market areas upon a fair competitive basis the minimum prices and the rules and regulations proposed by them, respectively, under subsection (a) hereof. Such coordination, among other factors, but without limitation, shall take into account the various kinds, qualities and sizes of coal, and transportation charges upon coal. All minimum prices proposed for any kind, quality, or size of coal for shipment into any common consuming market area shall be just and equitable, and not unduly prejudicial or preferential, as between and among districts, shall reflect, as nearly as possible, the relative market values, at point of delivery in each common consuming market area, of the various kinds, qualities, and sizes of coal produced in the various districts, taking into account values as to uses, seasonal demand, transportation methods and charges and their effect upon a reasonable opportunity to compete on a fair basis, and the competitive relationships between coal and other forms of fuel and energy; and shall preserve as nearly as may be existing fair competitive opportunities. The min-

imum prices proposed as a result of such coordination shall not, as to any district, reduce or increase the return per net ton upon all the coal produced therein below or above the minimum return, *as provided in subsection* (*a*) of this section by an amount greater than necessary to accomplish such coordination, to the end that the return per net ton upon the entire tonnage of the minimum price area shall approximate the weighted average of the total cost per net ton of the tonnage of such minimum price area. Such coordinated prices and rules and regulations, together with the data upon which they are predicated, shall be submitted to the Commission. The Commission shall thereupon establish, and from time to time, upon complaint or upon its own motion, review and revise the effective minimum prices and rules and regulations in accordance with the standards set forth in subsections (a) and (b) of Part II of this section." (Italics ours.)

It will be noted from the above quoted portions of Section 4 of the Act that *the Statistical Bureau is the only agency which has the right under that section to see the individual cost returns.* Its duty is to transmit "cost data" to the District Boards, in statistical form presumably, for not only the very name "Statistical Bureau" but also the existence of the Statistical Bureau at all, leads to such a construction. The District Boards in turn, on the basis of the data submitted by the Statistical Bureau, and not on the basis of the individual cost returns, compute the weighted average of the total cost of the tonnage produced in the dis-

trict, and make adjustments for certain trends and changes not here relevant. The District Boards transmit this weighted average figure to the Commission, together with the computations upon which it is computed, and the Commission, in turn, on the basis of the figures and computations received from the District Boards (which, of course, include the data which the District Board received from the Statistical Bureau) computes the weighted average of total cost of the tonnage produced in each minimum price area, making certain adjustments for trends and changes not here relevant. At this stage of the procedure no prices are fixed. The computation of the Commission merely serves as a basis for the proposal and coordination of minimum prices which the District Boards make, and which the Commission reviews and may revise, and by order carries into effect.

It will thus be noted that the duties of the District Boards and of the Commission are described in detail in Section 4, and, more important, the data upon which they are required to make their computations are also specifically set forth *and this data does not, by the terms of the Statute itself, include the individual cost returns.* It is difficult to see how the individual cost report could possibly have any bearing on the question of whether the Commission or the District Boards performed their respective duties under the provisions of the statute set out above.

If it be contended that there is no way of knowing whether the Commission complied with the mandates of the statute and arrived at its computation in the

manner directed by the statute, the answer is that all the evidence upon which it is required to base its computation either has already been or can, without any objection by petitioners, be made a part of the record in the proceeding before the Commission. *This consists, as required by the statute, of the cost data submitted to the District Boards by the Statistical Bureaus, and the weighted average cost figure for each district, together with the computations upon which it is based, submitted by District Boards to the Commission. The Commission is not required to make its computation from the individual cost reports.* If it be contended that there is no way of knowing whether the District Board complied with the statute and arrived at its computation in the manner directed by the statute, the answer is that all the evidence upon which the District Board is required to base its computation either already is or can, without any objection by petitioners be made, part of the record in the proceeding before the Commission. *This consists of the cost data submitted to it by the Statistical Bureau. The District Boards are not required to make their computations from the individual cost reports.* If it be contended that there is no way of knowing whether the Statistical Bureau complied with the statute and caused the cost data to truly reflect the individual cost returns for each district, the answer is, first, that the Commission's ruling of March 30, 1938 (R. 5, 6) states that the reports will be used for the sole purpose of supporting its and the District Boards' cost determinations; and second, that the statute itself requires

that the individual cost returns be kept confidential by the Statistical Bureau.

The Court May Not Change the Plain Terms of the Act in Order to Make It Constitutional.

Respondents in paragraphs 6, 8, and 10 of their motion to dismiss the bill of complaint allege that failure to disclose the cost reports would deprive interested parties of a full and fair hearing in accordance with due process of law and further contend that inasmuch as failure to disclose the individual cost returns would at least raise a serious constitutional question, it is the duty of the Court so to construe the Act as to avoid any question as to the constitutionality of the proceedings thereunder. In making this contention it is admitted by opposing counsel that there may be "some inconsistency" between Section 4 II (a) applicable to Code members and the exception in Section 10 (a) as construed by the Commission and for which construction counsel for the respondents here contend. But it is insisted by counsel that in order to avoid any question of constitutionality the Court should ignore this inconsistency. If, as plaintiff contends, the plain terms of the Act prohibit such construction, then the Court is without power to rewrite the Act or to ignore its plain terms in order to avoid a possible question of the constitutionality of the proceedings of the Commission under the Act.

This Court has so held in two recent cases. In *Hopkins Federal Savings & Loan Asso.* v. *Cleary*, 296 U. S.

315, 80 L. Ed. 251, 56 Sup. Ct. Rep. 235, this Court had before it an Act of Congress, known as the Home Owners Loan Act of 1933, Section 5 (i) of which authorized certain State associations to convert themselves into Federal associations under the Act, upon a vote of 51% of their stock, at a meeting called to consider such action. The State Supreme Court had held that in order to make this section constitutional it must be read as subject to the implied condition, that the conversion could not take place in contravention of the laws of the State, and that the 51% requirement should be read as a minimum requirement and it so construed it.

This Court held that Section 5 (i) was too clear for the application of the rule of construction applied by the Wisconsin Court, and, in answer to the contention that the Court should construe the Act so as to avoid any question as to its constitutionality, this Court said, quoting from the case of *George Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 77 L. Ed. 1265, 53 Sup. Ct. Rep. 620:

> "'But avoidance of a difficulty will not be pressed to the point of disingenuous evasion.' * * * 'Here the intention of the Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power.' * * * The problem must be faced and answered."

The Court proceeded to hold that, construed according to the plain intent of Congress, the section of the Act in question was unconstitutional. So we say

here, paraphrasing the language of this Court in the case just cited, that "the intention of the Congress is revealed too distinctly to permit the Court to ignore it because of mere misgivings as to power," and to hold to the contrary would be "disingenuous evasion." Here, however, it is not necessary to hold any provision of the Act unconstitutional, as in the *Hopkins case*, in order to give effect to the intent of Congress, so distinctly revealed.

The question as to the validity of action of the Commission in prescribing minimum prices without having introduced in evidence or made available for inspection the individual cost reports, is not now before the Court and not necessary for the Court to decide. However, we shall undertake to establish that the introduction in evidence of such individual cost reports is not necessary to the validity of an order of the Commission prescribing minimum prices.

Congress Had Power to Prohibit the Disclosure of Individual Cost Reports Used as a Basis for Calculating Average Cost, and the Disclosure of Such Reports When so Prohibited, is Not Essential to the Validity of an Order Establishing Prices.

The respondents contend in paragraphs 6, 8 and 10 of their motion to dismiss that the individual cost reports of the producers must be made available for introduction in evidence if the hearing prior to the issuance of the minimum price order is to be a "fair hearing," consistent with the Due Process Clause of

the Fifth Amendment. If we are correct in our contention that the Act prohibits such use of individual reports, then the question is, had Congress power to provide that individual cost reports should be used as the basis for calculating average costs without disclosing such reports and without depriving any one of due process? It is true Congress provided for a hearing, but it also expressly provided, if we are correct in our interpretation of the Act, that the average cost should be arrived at by the Commission and the District Boards on the basis of data which does not include the individual cost returns, whose secrecy is thus preserved. We insist that Congress had this power. There is no question but what Congress itself, without any hearing, could have fixed the basis upon which the Commission was to establish minimum prices. *Louisville & N. R. Co.* v. *Garrett,* 231 U. S. 298, 58 L. Ed. 229, 34 Sup. Ct. Rep. 48. It logically follows that Congress can delegate to an administrative agency the power to fix this basis without a hearing if it grants that agency no discretionary power, but, on the contrary, gives it detailed and specific instructions as to the manner in which, and on the basis of what data, the computation of that basis is to be made; for it is only where such an agency is granted the power to exercise discretion that a hearing having the attributes of a judicial hearing must be held. *Morgan* v. *United States,* 304 U. S. 1, 82 Law Ed. 757, 58 Sup. Ct. Rep. 773.

The contention of respondents ignores the whole scheme of the Bituminous Coal Act of 1937, for in order to conclude what Congress meant when it used the

word "hearing," and whether the administrative hearing is a "fair hearing," it is necessary to discover what Congress has provided as to such hearing and what are the duties of the administrative agency created by Congress, as well as what that administrative agency is required under the Act to do before it can issue an order. The word "hearing" cannot be defined with any exactness. What constitutes a "fair hearing" in one situation may violate "the rudimentary requirements of fair play," in another. Compare the decision of this Court on the petition for rehearing in *Morgan* v. *United States,* 304 U. S. 1, 82 L. Ed. 1030, 58 Sup. Ct. Rep. 999, and its decision in *National Labor Relations Board* v. *Mackay Radio & Teleg. Co.,* 304 U. S. 333, 82 L. Ed. 861, 58 Sup. Ct. Rep. 904. Plaintiffs do not contend that there is to be no hearing prior to the issuance of a minimum price order. They do contend that the word "hearing" must be read in connection with other provisions of the statute; that Congress having made specific and detailed provision for the manner in which, and upon the basis of what data, the computation of weighted average cost is to be arrived at, *which data does not include the individual cost returns,* and having made further specific provision for keeping the individual cost returns confidential, cannot be said to have intended, by the use of the word "hearing," to have destroyed the structure which it so carefully raised. As said by this Court in *Norwegian Nitrogen Products Company* v. *U. S.,* 288 U. S. 294, 317, 77 L. Ed. 796, 53 Sup. Ct. Rep. 350:

"We are not unmindful of cases in which the word 'hearing' as applied to administrative proceedings has been thought to have a broader meaning. All depends upon the context. There is no denial of the power of Congress to lay bare to the business rivals of a producer and indeed to the public generally every document in the office of this Commission and all the information collected by its agents. The question for us here is whether there was the will to go so far. *The answer will not be found in definitions of a hearing lifted from their setting and then applied to new conditions. The answer will be found in a consideration of the ends to be achieved in the particular conditions that were expected or foreseen.*" (Italics ours.)

It seems that in order to determine what is meant by "hearing," and what constitutes a "fair hearing," as applied to the proceeding before the Commission in its present stage, it is necessary to determine first to what issues the hearing is to be directed. We have already pointed out above that if the individual cost reports were introduced in evidence at the present stage of the proceeding before the Commission, there are only two issues: (1) Did the Commission, did the District Board, did the Statistical Bureau perform their respective duties in accordance with the mandates of the statute, and (2) are the individual cost reports correct, that is, *i. e.,* do they truly reflect the cost of production at the mines to which they relate. But inasmuch as the ruling of the Commission of March 30, 1938, recites that these cost reports will

be made available as bearing solely on the first issue, the necessity from a due process standpoint of making them available as bearing on the second issue, need not now be discussed. See also Commission's order of August 31, 1938 (R. 7, 8).

Obviously neither a "hearing" nor a "fair hearing" contemplates the requirement that data be disclosed having no relevancy to the matter as to which the hearing is held. Would the individual cost reports have any relevancy to the first issue described above? We have already shown that Section 4, Part II, of the Act, prescribes in detail the manner in which and upon the basis of what data the District Boards and the Commission are to determine weighted average cost for 1936. To repeat, the district boards are required to make this determination from "cost data" submitted to them by the proper statistical bureau. This computation (adjusted for certain trends not here relevant) the District Boards are required to submit to the Commission which in turn, on the basis of the figures and computations received from the District Boards (which of course includes the data which the District Board received from the Statistical Bureau) computes the weighted average of total costs of the tonnage produced in each minimum price area, it also making certain adjustments for trends not here relevant. At this stage of the proceeding no prices are fixed. The computation of the Commission merely serves as a basis for the proposal and coordination of minimum prices which the District Boards make, and which the Commission corrects or adopts and by order carries into effect.

Thus it will be noted from the portions of the Act above-quoted that the duties of the Commission are two-fold, one mechanical and the other *quasi*-judicial. The Commission acts mechanically, *i. e.*, makes a simple mathematical calculation in accordance with prescribed instructions and on the basis of specified data which the Act prescribes, ***and which does not include the individual cost returns,*** when it determines the weighted average of total costs for a minimum price area. The same is true of the District Boards. The Commission acts *quasi*-judicially when it determines (and on the basis of which determination, it issues a minimum price order), that the coordination of minimum prices, proposed by the District Boards, conforms to the substantive standards of Subsections (a) and (b) of Part II of Section 4, such as whether they are fair and equitable as between producers and as between districts, whether they reflect relative market values, whether they will produce a return approximating the weighted average cost, etc.

Up to and including the point in the statutory scheme at which the Commission computes the weighted average of total costs for a minimum price area, neither the Commission, the District Board, nor the Statistical Bureau has acted in a *quasi*-judicial capacity, except possibly in making the adjustments for trends already referred to. As to the adjustments, it would be proper to receive, and the Commission has received, evidence in support of those made. On the contrary, to ascertain the basic 1936

cost it has been required only to make a simple mathematical calculation on the basis of specific data prescribed by the statute, which does not include the individual cost returns. It has acted in a mere ministerial capacity. When Congress commands its agent to compute the basis for minimum prices to be established, and gives that agent specific and detailed instructions as to how, and upon the basis of what data, such computation is to be made, Congress is not delegating power in the sense that it does when it delegates to the Interstate Commerce Commission the power to fix reasonable rates; it is not delegating power to exercise any discretion; it is not delegating power to arrive at an informed judgment on facts adduced at any "hearing." It is these which are the attributes of administrative action of a *quasi*-judicial character, and it is only when one or more of these attributes is present that the hearing must have the characteristics of a judicial hearing to satisfy the requirements of due process. *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 57 L. Ed. 431, 33 Sup. Ct. Rep. 185; *Norwegian Nitrogen Products Co.* v. *United States, supra; St. Joseph Stockyard Co.* v. *United States*, 298 U. S. 38, 80 L. Ed. 1033, 56 Sup. Ct. Rep. 720; *Ohio Bell Telephone Company* v. *Public Utilities Commission of Ohio*, 301 U. S. 292, 81 L. Ed. 1093, 57 Sup. Ct. Rep. 724; *Morgan* v. *United States, supra.* In the *Morgan case*, this Court was very careful to distinguish between administrative proceedings of a *quasi*-judicial character and other administrative proceedings. In that case the Court said:

"The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and *that in administrative proceedings of a quasi-judicial character* the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing' —essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.'" (Italics ours.)

If it be contended that there is no way of knowing whether the Commission complied with the mandates of the statute and arrived at its computation in the manner directed by the statute, the answer is that all the evidence upon which it is required to base its computation has already been or can be, without objection by petitioners, made a part of the record in the proceeding before the Commission. This consists, as required by the statute, of the cost data submitted to the District Boards by the Statistical Bureaus, and the weighted average cost figure for each district, together with the computations upon which it is based, submitted by District Boards to the Commission. If it be contended that there is no way of knowing whether the District Board complied with the statute and arrived at its computation in the manner directed by

the statute, the answer is that all the evidence upon which the District Board is required to base its computation is already or can be, without objection by petitioners, made part of the record in the proceeding before the Commission. This consists of the cost data submitted to it by the Statistical Bureau. If it be contended that there is no way of knowing whether the Statistical Bureau complied with the statute and caused the cost data to truly reflect the individual cost returns for each district, the answer is, first, that the ruling of the Commission of March 30, 1938, provides that the individual cost reports are to be available for inspection as bearing solely on the correctness of its and the District Board's calculations, and not the Statistical Bureau's, and, second, that the statute itself requires that the individual cost returns be kept confidential by the Statistical Bureau. See also Commission's order of August 31, 1938 (R. 7, 8).

Individual Cost Reports Not of Themselves Competent Evidence. Their Verity Must Be Subject to Test, and Such Test Would Render Administration of Act Impossible.

The orders of the Commission directed that the individual cost reports be made available only for the purpose of establishing "the correctness of said composite reports heretofore introduced in evidence in this proceeding." These composite reports are those compiled from individual reports. It is therefore apparent that the Commission proposes that there shall be no opportunity for interested parties to test the

individual reports to ascertain whether they truly reflect the cost of production at the mines to which they relate. It is clear, however, that the individual cost reports would not be admissible as evidence over objection unless interested parties be permitted to test their truth and verity and to introduce evidence to show that they are not correct. Such use would require subpoening, to testify at the hearing before the Commission, the officers of each company who verified the report, as well as the books and records of each such company from which the reports were made. Because of the large number of reports that were filed for 1936 alone, such use of these reports would prolong the administrative proceeding indefinitely, encumber the administrative record unnecessarily, and result in the expiration of the Act by its own terms before any minimum price could be fixed. "There must be a limit to individual argument in such matters if government is to go on." Holmes, J., in *Bimetallic Investment Co. v. State Board of Equalization*, 239 U. S. 411, 60 L. Ed. 372, 36 Sup. Ct. Rep. 141.

The Interstate Commerce Commission, which is the oldest administrative agency, does not hesitate to exercise its power to fix rates of common carriers between particular points and on particular traffic without evidence which shows the underlying cost and transportation data of the railroads by divisions or by commodities. On the contrary, most of the decisions of that Commission which prescribe rates of common carriers are based on system or group aver-

ages of operating costs of carriers and on records that do not show such underlying data. A few of such cases are cited: *Iron Ore Rate Case,* 41 I. C. C. 181; *Public Service Commission of Georgia* v. *A. C. L. R. Co.,* 186 I. C. C. 156; *Adriatic Mining Co.* v. *C. & N. W. Ry. Co.,* 78 I. C. C. 611; *Bituminous Coal to C. F. A. Territory,* 46 I. C. C. 66; *A. C. L. R. Co.* v. *Arcade & Attica R. R.,* 194 I. C. C. 746; *Rates on Cotton, etc.,* 208 I. C. C. 677; *B. & O. R. Co.* v. *U. S.,* 298 U. S. 349; *New England Divisions Case,* 66 I. C. C. 196, sustained by this Court in *New England Divisions Case,* 261 U. S. 184, 67 L. Ed. 605, 43 Sup. Ct. Rep. 270. The order of the Commission in that case was challenged by certain railroads on the ground that it was based on evidence of average or typical divisions of the railroads involved and not on the individual divisions of each of the carriers. The Court answered that contention in these words:

> "Obviously, Congress intended that a method should be pursued by which the task, which is imposed upon the Commission, could be performed. The number of carriers which might be affected by an order of the Commission, if the power granted were to be exercised fully, might far exceed 600; the number of rates involved, many millions. The weak roads were many. The need to be met was urgent. To require specific evidence, and separate adjudication in respect to each division of such rate of each carrier, would be tantamount to denying the possibility of granting relief. We must assume that Congress knew this; and that it knew also, that the Commission

had been confronted with similar situations in the past and how it had dealt with them."

We therefore submit that Congress has delegated no discretionary power in directing its agency to make specified computations from designated underlying figures and therefore Congress was acting within its power when it provided that such underlying figures be held as the confidential records of the citizens furnishing them.

Other Acts of Congress Provide for Administrative Determination on Basis of Statistics Compiled Without a Hearing.

The Bituminous Coal Act of 1937 is not the only recent Act of Congress which provides for administrative determinations to be made on the basis of statistics. The Agricultural Adjustment Act of 1938 (52 Stat. 31), for example, imposes marketing quotas on farmers in the case of certain commodities when the Secretary of Agriculture finds, on the basis of the latest available statistics of the Federal Government, that the current supply of the commodity concerned is a specified percentage above normal. In the case of tobacco, for example, both the determination of whether the quota should be imposed, as well as of the number of pounds which may be marketed, is made by the Secretary on the basis of the latest available statistics of the Federal Government. The national quota is apportioned among the various producing States on the basis of past production therein over a

specified period, and the State quota is apportioned among the various producing counties on the basis of past production therein over a specified period, all as determined by the Secretary from the latest available statistics of the Federal Government. Of course, the quota for the individual farm depends on the amount of the national and the State as well as the County quota. But the Act does not stop here. It provides that the allotment of the county quota to individual farms is to be made on the basis of their past production over a specified period, the termination to be made from the latest available statistics of the Federal Government. No provision of the Act authorizes the disclosure of the underlying data upon which these statistics are computed. If there were such a provision, the Act would be rendered totally unworkable.

The Agricultural Adjustment Act of 1933 (48 Stat. 32), provided for a processing tax with respect to certain commodities, the rate of which was equal to the difference between the current average farm price of the commodity, as determined by the Secretary of Agriculture on the basis of statistics, and the fair exchange value of the commodity, also as determined by the Secretary on the basis of statistics. That Act contained no provision authorizing the disclosure of the underlying data. This Court, in *United States* v. *Butler*, 297 U. S. 1, 80 L. Ed. 477, 56 Sup. Ct. Rep. 312, in holding the Act unconstitutional, did not so much as intimate that it found any fault with the fixing of a tax rate in such a manner.

The Sugar Act of 1937 (50 Stat. 1100) provides for a sugar quota in each year, specified portions of which are to be allotted to each producing area. The amount of the quota is based on the domestic requirements for sugar, as determined by the Secretary of Agriculture on the basis of official statistics of the Department of Agriculture. The Secretary is also given power to prorate the allotment made to any producing area among the producers therein. No provision of the Act authorizes the disclosure of the underlying data upon which the official statistics are computed. If any provision did, not only would the Sugar Act of 1937 be rendered totally unworkable, but also the Bureau of Agriculture Economics, which compiles the Department statistics, would, because of the necessity of appearing continuously at hearings, cease to function as a Statistical Bureau.

The Fair Labor Standards Act of 1938 (52 Stat. 1060), generally known as the Wage and Hour Act, adopts a procedure for fixing minimum wages strikingly similar to that adopted in the Bituminous Coal Act of 1937. The Fair Labor Standards Act provides for the creation of an industry committee for each industry, whose duty it is to recommend to the Administrator the highest minimum wages for their respective industries which will not substantially curtail employment in the industry. The Administrator then holds a hearing, and if he finds that the wages recommended are the highest which can be paid without substantial curtailment of employment, he approves them, otherwise he rejects them.

In order to discharge their functions, the committees and the Administrator must know, for each industry, its total costs, its wage costs, its realization and its competition. How are these matters to be ascertained and proved in evidence? The Act does not say. But if public inquiry must be made into the affairs of each employer in each industry, or if the reports on these matters made by all the employers in each industry are to be exposed to the public or introduced in evidence at the hearings and subjected to inquiry as to exactness, then this Act cannot, as a practical matter, be administered.

If respondents in this suit are correct in their interpretation of the type of hearing required under the due process clause, the validity of the procedure prescribed by Congress in these other regulatory acts, or their workability, or both, may be subject to grave doubt. All of these Acts deal with far-flung industries of nation-wide extent, and it is reasonable to suppose that Congress, in delegating its legislative functions, should be permitted to adapt the administrative procedure to the ends to be achieved, and that procedural restrictions should not be imposed which would have the practical effect of making the delegation worthless and nugatory.

CONCLUSION.

It is submitted that the District Court had jurisdiction to grant the relief sought and that the complaint states facts sufficient to constitute a cause of action. It is further submitted that the Bituminous Coal Act of 1937, properly construed, prohibits the National Bituminous Coal Commission from making public, in the manner proposed, the cost and realization reports filed with it by Code members, and that in threatening to make such reports public the Commission is transcending the powers conferred upon it and unlawfully assuming the exercise of the power of government against petitioners to their irreparable injury.

It is therefore respectfully urged that the decree of the United States Court of Appeals for the District of Columbia be reversed and that the case be remanded with directions that the respondents be enjoined as prayed.

Respectfully submitted,

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Attorneys for Petitioners.

December 27, 1938.

APPENDIX.

Excerpts From Bituminous Coal Act of 1937.

"Sec. 2 (a). * * * No order which is subject to judicial review under section 6, and no rule or regulation which has the force and effect of law, shall be made or prescribed by the Commission, unless it has given reasonable public notice of a hearing, and unless it has afforded to interested parties an opportunity to be heard, and unless it has made findings of fact. * * *."

"[Sec. 3] (b). In addition to the tax imposed by subsection (a) of this section, there is hereby imposed upon the sale or other disposal of bituminous coal produced within the United States, when sold or otherwise disposed of by the producer thereof, which would be subject to the application of the conditions and provisions of the code provided for in section 4, or of the provisions of section 4-a, an excise tax in an amount equal to 19½ per centum of the sale price at the mine in the case of coal disposed of by sale at the mine, or in the case of coal disposed of otherwise than by sale at the mine, and coal sold otherwise than through an arms' length transaction, 19½ per centum of the fair market value of such coal at the time of such disposal or sale. In the case of any producer who is a code member as provided in section 4 and is so certified to the Commissioner of Internal Revenue by the Commission, the sale or disposal by such producer during the continuance of his membership in the code of coal produced by him shall be exempt from the tax imposed by this subsection."

* * * * * * * * *

"Sec. 4 [Part I] (a). Twenty-three district boards of code members shall be organized. Each district board shall consist of not less than three nor more than seventeen members. The number of members of the district board shall, subject to the approval of the Commission, be determined

by the majority vote of the district tonnage during the calendar year 1936 represented at a meeting of the code members of the district called for the purpose of such determination and for the election of such district board; and all code members within the district shall be given notice of the time and place of the meeting. All but one of the members of the district board shall be code members or representatives of code members truly representative of all the mines of the district. The number of such producer members shall be an even number. One-half of such producer members shall be elected by a majority in number of the code members of the district represented at the aforesaid meeting. The other producer members shall be elected by votes cast in the proportion of the annual tonnage output of the code members in the district for the calendar year preceding the date of the election. *Provided,* that not more than one officer or employee of any code member within a district shall be a member of the district board at the same time. The remaining member of each district board shall be selected by the organization of employees representing the preponderant number of employees in the industry of the district in question. The term of district board members shall be two years and until their successors are elected. The Commission shall have power to remove any member of any district board upon its finding, after due notice and hearing, that said member is guilty of inefficiency, willful neglect of duty, or malfeasance in office.

"The district boards shall have power to adopt by-laws and rules of procedure, subject to approval of the Commission, and to appoint officers from within or without their own membership, to fix their terms and compensation, to provide for reports, and to employ such committees, employees, arbitrators, and other persons necessary to effectuate their purposes. Members of the district board shall serve, as such, without compensation but may be reimbursed for their reasonable expenses. The territorial boundaries or limits of the twenty-three districts are set forth

in the schedule entitled 'Schedule of Districts' and annexed to this subchapter.

"Whenever the Commission upon investigation instituted upon its own motion or upon petition of any code member, district board, State or political subdivision thereof, or the consumers' counsel, after hearing finds that the territorial boundaries or limits of any district or minimum-price area are such as to make it substantially impracticable to establish minimum prices in accordance with all the standards set forth in subsections (a) and (b) of Part II of this section, and that a change in such territorial boundaries or limits or a division or consolidation of such districts or minimum-price areas would render the establishment of minimum prices in accordance with all such standards more practicable, it shall by order make such changes, divisions, and consolidations as it finds will substantially aid in such establishment of minimum prices."

* * * * * * * * * *

"Sec. 4 [Part II]. The Commission shall have power to prescribe for code members minimum and maximum prices, and marketing rules and regulations, as follows:

"(a) All code members shall report all spot orders to such statistical bureau hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the preparation, cost, sale and distribution of coal as the Commission may authorize or require. All such records shall be held by the statistical bureau as the confidential records of the code member filing such information.

"For each district there shall be established by the Commission a statistical bureau which shall be operated and maintained as an agency of the Commission. Each statistical bureau shall be under the direction of a manager, who shall be appointed by the Commission. No producer,

employee, or representative of a producer, and, except as the Commission may specifically approve, no member of a district board or employee or representative thereof shall be an employee of any statistical bureau.

"Each district board shall, from time to time on its own motion or when directed by the Commission, propose minimum prices free on board transportation facilities at the mines for kinds, qualities, and sizes of coal produced in said district, and classification of coal and price variations as to mines, consuming market areas, values as to uses and seasonable demand. Said prices shall be proposed so as to yield a return per net ton for each district in a minimum price area, as such districts are identified and such area is defined in the subjoined table designated 'minimum-price-area table,' equal as nearly as may be to the weighted average of the total costs, per net ton, determined as hereinafter provided, of the tonnage of such minimum price area. The computation of the total costs shall include the cost of labor, supplies, power, taxes, insurance, workmen's compensation, royalties, depreciation and depletion (as determined by the Bureau of Internal Revenue in the computation of the Federal income tax) and all other direct expenses of production, coal operators' association dues, district board assessments for Board operating expenses only levied under the code, and reasonable costs of selling and the cost of administration."

* * * * * * * * *

"As soon as possible after its creation, each district board shall determine, from cost data submitted by the proper statistical bureau of the Commission, the weighted average of the total costs of the ascertainable tonnage produced in the district in the calendar year 1936. The district board shall adjust the average costs so determined, as may be necessary to give effect to any changes in wage rates, hours of employment, or other factors substantially affecting costs, exclusive of seasonal changes, so as to reflect as accurately as possible any change or changes which

may have been established since January, 1936. Such determination and the computations upon which it is based shall be promptly submitted to the Commission by each district board in the respective minimum-price area. The Commission shall thereupon determine the weighted average of the total costs of the tonnage for each minimum-price area in the calendar year 1936, adjusted as aforesaid, and transmit it to all the district boards within such minimum-price area. Said weighted average of the total costs shall be taken as the basis, to be effective until change by the Commission, for the proposal and establishment of minimum prices.

* * * * * * * * *

"(b) District boards shall, under the rules and regulations established by the Commission, coordinate in common consuming market areas upon a fair competitive basis the minimum prices and the rules and regulations proposed by them, respectively, under subsection (a) hereof. Such coordination, among other factors, but without limitation, shall take into account the various kinds, qualities and sizes of coal, and transportation charges upon coal. All minimum prices proposed for any kind, quality, or size of coal for shipment into any common consuming market area shall be just and equitable, and not unduly prejudicial or preferential, as between and among districts, shall reflect, as nearly as possible, the relative market values, at point of delivery in each common consuming market area, of the various kinds, qualities, and sizes of coal produced in the various districts, taking into account values as to uses, seasonal demand, transportation methods and charges and their effect upon a reasonable opportunity to compete on a fair basis, and the competitive relationships between coal and other forms of fuel and energy; and shall preserve as nearly as may be existing fair competitive opportunities. The minimum prices proposed as a result of such coordination shall not, as to any district, reduce or increase the return per net ton upon all the coal produced therein be-

low or above the minimum return, as provided in subsection (a) of this section by an amount greater than necessary to accomplish such coordination, to the end that the return per net ton upon the entire tonnage of the minimum price area shall approximate the weighted average of the total cost per net ton of the tonnage of such minimum price area. Such coordinated prices and rules and regulations, together with the data upon which they are predicated, shall be submitted to the Commission. The Commission shall thereupon establish, and from time to time, upon complaint or upon its own motion, review and revise the effective minimum prices and rules and regulations in accordance with the standards set forth in subsections (a) and (b) of Part II of this section.

"(c) When in the public interest, the Commission deems it necessary to establish maximum prices for coal in order to protect the consumer of coal against unreasonably high prices therefor, the Commission shall have the power to establish maximum prices free on board transportation facilities for coal in any district. Such maximum prices shall be established at a uniform increase above the minimum prices in effect within the district at the time, so that in the aggregate the maximum prices shall yield a reasonable return above the weighted average total cost of the district: *Provided*, That no maximum price shall be established for any mine which shall not yield a fair return on the fair value of the property.

"(d) If any code member of district board or member thereof, or any State or political subdivision of a State, or the consumers' counsel, shall be dissatisfied with such coordination of prices or rules and regulations, or by any minimum or maximum prices established pursuant to subsections (b) and (c) of this section, he or it shall have the right, by petition, to make complaint to the Commission, and the Commission shall, under rules and regulations established by it, and after notice and hearing, make such order as may be required to effectuate the purpose of sub-

sections (b) and (c) of this section. Pending final disposition of such petition, and upon reasonable showing of necessity therefor, the Commission may make such preliminary or temporary order as in its judgment may be appropriate, and not inconsistent with the provisions of this Act."

* * * * * * * * * *

"(j) The Commission shall have jurisdiction to hear and determine written complaints made by any code member, district board, or member thereof, State or political subdivision of a State, or the consumers' counsel, which charge any violation of the code specified in this section. It shall make and publish rules and regulations for the consideration and hearing of any such complaint, and all interested parties shall be required to conform thereto. The Commission shall make due effort toward adjustment of such complaints and shall endeavor to compose the differences of the parties, and shall make such order or orders in the premises, from time to time, as the facts and circumstances warrant. Any such order shall be subject to review as are other orders of the Commission.

"(k) In the investigation of any complaint or violation of the code, or of any rule or regulation the observance of which is required under the terms thereof, the Commission shall have power by order to require such reports from, and shall be given access to inspect the books and records of, code members to the extent deemed necessary for the purpose of determining the complaint. Any such order shall be subject to review as are other orders of the Commission."

* * * * * * * * * *

"Sec. 4-A. Whenever the Commission upon investigation instituted upon its own motion or upon petition of any code member, district board, State or political subdivision thereof, or the consumers' counsel, after hearing finds that transactions in coal in intrastate commerce by any person

or in any locality cause any undue or unreasonable advantage, preference, or prejudice as between persons and localities in such commerce on the one hand and interstate commerce in coal on the other hand, or any undue, unreasonable, or unjust discrimination against interstate commerce in coal, or in any manner directly affect interstate commerce in coal, the Commission shall by order so declare and thereafter coal sold, delivered or offered for sale in such intrastate commerce shall be subject to the provisions of section 4.

"Any producer believing that any commerce in coal is not subject to the provisions of section 4 or to the provisions of the first paragraph of this section may file with the Commission an application, verified by oath or affirmation for exemption, setting forth the facts upon which such claim is based. The filing of such application in good faith shall exempt the applicant, beginning with the third day following the filing of the application, from any obligation, duty, or liability imposed by section 4 with respect to the commerce covered by the application until such time as the Commission shall act upon the application. If the Commission has reason to believe that such exemption during the period prior to action upon the application is likely to permit evasion of the Act with respect to commerce in coal properly subject to the provisions of section 4 or of the first paragraph of this section, it may suspend the exemption for a period not to exceed ten days. Within a reasonable time after the receipt of any application for exemption the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of such applications. As a condition to the entry of and as a part of any order granting such application, the Commission may require the application to apply periodically for renewals of such order and to file such periodic reports as the Commission may find necessary or appropriate to enable it to determine whether the conditions supporting the exemption continue to exist. Any

applicant aggrieved by an order denying or otherwise disposing of an application for exemption by the Commission may obtain a review of such order in the manner provided in subsection (b) of section 6."

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"Sec. 5 (a). Upon the appointment of the Commission it shall at once promulgate said code and assist in the organization of the district boards as provided for in section 4, and shall prepare and supply to all coal producers forms of acceptance for membership therein. Such forms of acceptance, when executed, shall be acknowledged before any official authorized to take acknowledgments."

• • • • • • • • • • •

"Sec. 14 (a). The Commission shall study and investigate the matter of increasing the uses of coal and the problems of its importation and exportation; and shall further investigate—

(1) The economic operations of mines with the view to the conservation of the national coal resources.

(2) The safe operation of mines for the purpose of minimizing working hazards, and for such purpose shall be authorized to utilize the services of the Bureau of Mines.

(3) The problem of marketing to lower distributing costs for the benefit of the consumer.

(4) The Commission shall, as soon as reasonably possible after its appointment, investigate the necessity for the control of production of coal and methods of such control, including allotment of output to districts and producers within such districts and shall hold hearings thereon.

(b) The Commission shall annually report the results of its investigations under this action, together with its rec-

ommendations, to the Secretary of the Interior for trans
mission by him to Congress."

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"Sec. 16. To safeguard the interests of those con
cerned in the mining, transportation, selling, and consump
tion of coal, the Commission or the office of consumers' coun
sel is hereby vested with authority to make complaint t
the Interstate Commerce Commission with respect to rate
charges, tariffs, and practices relating to the transportatio
of coal, and to prosecute the same. Before proceeding t
hear and dispose of any complaint filed by another tha
the Commission, involving the transportation of coal, th
Interstate Commerce Commission shall cause the Commi
sion and the office of consumers' counsel to be notified o
the proceeding, and, upon application to the Interstat
Commerce Commission, shall permit the Commission an
consumers' counsel to appear and be heard. The Interstat
Commerce Commission is authorized to avail itself of th
cooperation, services, records, and facilities of the Com
mission."